Supreme Court, U.S.
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No. 02- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES SHOE CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress by statute waive the government's immunity from the more than $700 million in interest owed to more than 7500 exporters on refunds of the Harbor Maintenance Tax, which this Court previously held in this case violates the Constitution's Export Clause?

2. Is such a waiver unnecessary either because the government is required to pay interest under the Export Clause or because it is at least required to return the more than $70 million in profits it actually earned by investing the HMT payments, as this Court held in *Henkels* v. *Sutherland*, 271 U.S. 298 (1926)?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

RULE 29.6 STATEMENT

Petitioner United States Shoe Corp. is a wholly owned subsidiary of Luxottica U.S. Holding Corp., which in turn is a wholly owned subsidiary of Luxottica Group S.p.A., Italy, a publicly held corporation. On May 23, 1995, the assets of the Footwear Division of United States Shoe Corp. were acquired by Nine West Corporation, a publicly held corporation that was subsequently acquired by Jones Apparel Group, Inc., a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner United States Shoe Corp. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 1a-12a) is published at 296 F.3d 1378. The opinion of the U.S. Court of International Trade (Pet. App. 13a-19a) is published at 20 C.I.T. 206.

JURISDICTION

The U.S. Court of Appeals for the Federal Circuit denied a timely petition for rehearing *en banc* (Pet. App. 114a-15a) on October 22, 2002. The Chief Justice previously extended the time to file this petition to and including February 19, 2003. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the appendix (at 130a-43a).

STATEMENT OF THE CASE

This petition presents the unfinished business of this Court's prior, unanimous ruling in this case that the Harbor Maintenance Tax (HMT) violates the Constitution's Export Clause. *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) [hereinafter *U.S. Shoe I*] (Pet. App. 102a-10a); U.S. CONST. art. I, § 9, cl. 5. The Court of International Trade on remand ordered the United States to refund the HMT payments together with interest. That interest represents the considerable lost time-value of the money that the government first unconstitutionally exacted and later continued to hold. But, in an opinion that fails to follow either the

letter or the spirit of this Court's prior ruling, the Federal Circuit reversed the award of interest.

The questions presented are important because this case controls approximately 7500 claims pending administratively or in the lower courts. The vast number of cases spans the many years since the HMT was enacted in 1986, during which the government has fought tooth and nail to delay – and continues to this day to delay – refunding even the principal. The resultant amount of interest owing to exporters that is at stake in this case is at least $700 million, and growing. The government itself has earned at least a $70 million profit by investing the money that it unconstitutionally exacted from exporters. Further, exclusive jurisdiction lies in the Court of International Trade and subsequently the Federal Circuit, so exporters have no other forum in which they can pursue their claims to interest.

This Court should accordingly grant certiorari to decide two questions:

First, did Congress waive the government's immunity from interest on HMT refunds? Petitioners urge that the answer is "yes." Congress comprehensively waived the government's immunity from interest in numerous statutes governing refunds of both customs duties and taxes. One statute, in particular, is plain. Congress provided that the HMT shall be treated as "a customs duty" (26 U.S.C. 4462(f)(1)), a fact that played a central role in this Court's prior ruling that the CIT has jurisdiction over the case (Pet. App. 105a-06a). Congress specified, in turn, that refunds of customs duties shall be paid "together with interest thereon." 19 U.S.C. 1505(b). Even the government should concede that Section 1505 applies here, for that is the authority upon which it relies in *refunding the principal*. Further, the government previously acknowledged that it "is *required* to apply the rules and principles of section [1505]" to the HMT because "section [1505] is one of the customs laws which by Congressional mandate applies" to the HMT. Pet. App. 141a (emphasis

added). The Federal Circuit's holding that interest is nonetheless not available thus does not accord with the statutory text, this Court's prior decision in this case, or the government's own practice.

Even if a convoluted course of statutory arguments could be employed to conclude that Congress did not waive the government's immunity from interest and thus inadvertently permitted the manifestly unjust outcome reached below, certiorari is warranted to decide a second question: is the "no-interest" presumption applicable here? The court of appeals' holding that the remedy for violations of the Export Clause does not include an award of interest – such that the government may effectively demand of exporters an interest-free loan – runs directly contrary to the constitutional design, which (as the Court previously held in this very case) sought to prevent any burden on exports by "denying to Congress the power to tax exports *at all*." Pet. App. 108a (emphasis added). Here, the government claims the right to deprive exporters of the lost time-value of the unlawfully exacted money to the tune of more than $700 million. At the very least, the Export Clause requires the government to disgorge the *actual proceeds* it earned on the unconstitutional exaction, for the framers intended that "exports should *not* be made a source of revenue to the National Government" (*Fairbank* v. *United States*, 181 U.S. 283, 292-93 (1901) (emphasis added)).

Indeed, the no-interest presumption is simply inapplicable where (as here) the government has actually realized profits from its investment of unlawful exactions. Such a case involves what Justice Kennedy has termed "accrued interest" – *viz.*, proceeds that the government itself has actually reaped from exactions that were invalid *ab initio*. *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 540 (1998) (concurring opinion). The Federal Circuit's decision cannot be reconciled with this Court's express holdings that the government must disgorge the proceeds it earns on unlawfully exacted funds,

and that the no-interest presumption is inapplicable in that circumstance. *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). Two courts of appeals (disagreeing with four other circuits) have reached the same conclusion and would award the proceeds to exporters.

In addition to the Export Clause, two other constitutional provisions – the Takings and Due Process Clauses – require the government to disgorge its profits in this case, both on the ground that the framers could not have intended to permit the government to adopt an unconstitutional tax, only to keep proceeds earned on the principal over many years while the unlawfulness of the exaction is determined. Even if the government's retention of those discrete, identifiable, and identified proceeds did not amount to a "taking" of the claimants' property within the meaning of the Fifth Amendment, surely the government's retention of those funds cannot be dignified as a deprivation of that property with "due process of law."

At the very least, the Federal Circuit's construction of the governing statutes not to support an award of interest should be rejected because it raises serious constitutional questions under the Export, Takings, and Due Process Clauses.

The petition for a writ of certiorari should accordingly be granted.

1. Congress enacted the Harbor Maintenance Tax (HMT) in 1986. 26 U.S.C. 4461-4462. The HMT charged shippers, including exporters, a percentage of the value of the cargo they shipped through the nation's ports. *Id.* § 4461(b), (c)(1)(B). Congress directed that funds collected under the HMT be held in a separate "Harbor Maintenance Trust Fund." 26 U.S.C. 9505. The statute furthermore required that the HMT funds be invested "in interest-bearing obligations of the United States" and that revenues therefrom "be credited to and form part of the Trust Fund." *Id.* § 9602(b)(1), (b)(3). The interest was reported separately to Congress.

Congress did not adopt a wholly new statutory scheme for the collection, expenditure, and refund of funds paid under the HMT. Nor did it enact a raft of amendments to the many provisions of the U.S. Code governing existing customs duties. Rather, it took a shortcut, directing that the already-existing customs statutes would govern the HMT through the "[e]xtension of provisions of law applicable to customs dut[ies]." 26 U.S.C. 4462(f) (title). Specifically, "*all* administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * as if such tax were a customs duty." *Id.* § 4462(f)(1) (emphasis added). Further, "[f]or purposes of determining the jurisdiction of any court of the United States * * *, the [HMT] shall be treated as if such tax were a customs duty." *Id.* § 4462(f)(2).

The HMT applied to tens of thousands of exporters, including petitioner U.S. Shoe Corp. Petitioner paid the tax but sued the United States in the Court of International Trade (CIT) on the ground that the HMT violated the Constitution's Export Clause. The Export Clause provides: "No Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

A special three-judge panel of the CIT unanimously agreed that the HMT violated the Export Clause and ordered the United States to refund to exporters the tax they had paid. Pet. App. 20a-57a. On the government's appeal, a special five-judge panel of the Federal Circuit concluded that the CIT had jurisdiction under 28 U.S.C. 1581(i) and affirmed on the merits. Pet. App. 62a-88a. Only Chief Judge Mayer dissented. *Id.* 89a-101a.

2. The Solicitor General's petition for certiorari from the Federal Circuit's decision asserted that review was essential because "several thousand cases pending in the Court of International Trade and the Court of Federal Claims raise the same question presented in this case" and the funds at stake "exceed several hundred million dollars." No. 97-372, Pet.

for Cert. 25. "In similar contexts," the government explained, "this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance," particularly when (as in this case) there is no realistic prospect that "any other court of appeals will have an opportunity to review the issue." *Id.* See also *id.* at 12.

This Court granted certiorari (522 U.S. 944 (1997)) and unanimously affirmed (Pet. App. 102a-10a). Preliminarily, the Court agreed that jurisdiction was proper in the CIT under 28 U.S.C. 1581(i). That statute provides in relevant part: "[T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * revenue from imports" or relating to other duties or restrictions on "the importation of merchandise." *Id.* § 1581(i)(1)-(3). This Court rejected the argument that Section 1581(i) does not apply to a duty on *exports*. The Court found the fact that the statute nominally applied only to "imports" both "hardly surprising in view of the Export Clause, which confines customs duties to imports," and also *irrelevant* because "'Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction.'" Pet. App. 106a (alterations in original) (quoting CIT's decision, Pet. App. 46a).

On the merits, this Court affirmed the Federal Circuit's holding that the HMT was unconstitutional as applied to exports. The text and purposes of the Export Clause, the Court explained, categorically prohibit any tax on exports. "[T]he Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority." Pet. App. 108a. The framers, having determined that "exports should not be made a source of revenue to the National Government" and furthermore "that the National Government should put nothing in the way of burden upon such exports" (*Fairbank* v. *United States*, 181 U.S. 283, 292-93 (1901)), "*completely*

den[ied] to Congress the power to tax exports *at all*" (Pet. App. 108a (quoting *United States* v. *IBM Corp.*, 517 U.S. 843, 861 (1996)) (alterations omitted) (emphasis added)).

3. On remand, the CIT reinstated its order that the government refund the HMT. Pet. App. 111a-13a.[1] By that time, exporters had been assessed approximately $1.4 billion. The statutory interest owing to exporters totals at least $700 million. The CIT directed that the refunds include interest. *Id.* 112a-13a.

On the government's appeal, the Federal Circuit reversed. Pet. App. 1a-12a (per Mayer, C.J.). The court of appeals first rejected U.S. Shoe's arguments that Congress had waived the government's immunity from interest by statute. See Pet. App. 4a-6a (applying its ruling in a parallel suit by IBM, *reproduced infra* at Pet. App. 116a-29a[2]). Although the court of appeals acknowledged the provisions of the customs and tax laws broadly waiving the federal government's immunity from interest, it concluded that a refund of the HMT did not fall within any of those statutes.

The Federal Circuit thus held that interest was not available under 19 U.S.C. 1505, which provides in relevant part:

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[1] The Federal Circuit also approved an administrative refund mechanism for exporters in *Swisher International, Inc.* v. *United States*, 205 F.3d 1358, *cert. denied*, 531 U.S. 1036 (2000). This case will determine whether exporters receiving these "*Swisher* refunds" will receive interest from the date they made their HMT payments.

[2] The Federal Circuit in *IBM* rejected an exporter's claim that it had a statutory right to interest. The exporter then sought review in this Court, but only on constitutional grounds that the Federal Circuit had not addressed. See U.S. BIO, No. 00-482, at 5 ("[T]he asserted constitutional issues that petitioner now seeks to raise were not raised in the court of appeals and are thus not properly presented in this case."). This Court not surprisingly denied certiorari. 531 U.S. 1183 (2001).

> 19 U.S.C. 1505(b). [R]efund of duties * * * and interest due upon liquidation or reliquidation. The Customs Service shall * * * refund any excess monies deposited, together with interest thereon, as determined on a liquidation or reliquidation.
>
> 19 U.S.C. 1505(c). Interest. Interest on excess moneys deposited shall accrue * * * from the date the importer of record deposits estimated duties, fees, and interest * * * to the date of liquidation or reliquidation of the applicable entry or reconciliation.

The court of appeals acknowledged Congress's direction that "*all* administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * *as if such tax were a customs duty*." 26 U.S.C. 4462 (f)(1) (emphases added). Nor was there any dispute that Section 1505 *is* an "administrative and enforcement provision of the customs laws." Pet. App. 5a-6a. Yet the court of appeals nonetheless held that Section 1505 was inapplicable on the ground that it "contemplates an entirely different factual scenario from the one before us" because the terms "importer of record," "liquidation," and "entry" do not apply to the taxation of exports. *Id.* 128a.

The Federal Circuit also held that interest was not available under 28 U.S.C. 2411, which provides: "In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed * * *." See Pet. App. 5a. The court of appeals found it determinative that Congress had provided that "[t]he tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." 26 U.S.C. 4462(f)(3). According to the Federal Circuit, every provision of law relating to tax reimbursements – including any provision requiring the government to pay interest on court-ordered reimbursements – necessarily "re-

late[s] to the administration and enforcement of internal revenue taxes." Pet. App. 122a-27a.

The Federal Circuit also rejected U.S. Shoe's argument that an express waiver of the government's immunity was unnecessary because it was not seeking "interest." U.S. Shoe relied on the Sixth and Ninth Circuits' holdings that a court order requiring the government to disgorge the proceeds it earned on unlawfully forfeited money does not implicate the government's immunity from "interest." *United States* v. *$515,060.42*, 152 F.3d 491, 504-06 (CA6 1998); *United States* v. *$277,000*, 69 F.3d 1491 (CA9 1995). The government acknowledged that "the courts are split" over this question. U.S. C.A. Br. 46. The Federal Circuit, however, held that an express waiver of immunity is required even in this circumstance. Pet. App. 11a-12a.

The Federal Circuit separately rejected petitioner's argument that the Export Clause itself conferred either a right to the $700 million in lost time-value of the money or an entitlement to the more than $70 million in proceeds the government had actually earned on the unconstitutional HMT payments.[3] The court of appeals found it dispositive that the Takings Clause, which confers a right to interest, has a "restorative clause" that is absent from the Export Clause: private property shall not "be taken for public use without just compensation." Pet. App. 9a-11a.

Nor, the court of appeals held, did the Constitution otherwise require the government to disgorge the proceeds. There was no Fifth Amendment Taking or violation of the Due Process Clause, the court ruled, because "[t]he tax revenue here was not held by the government as property of U.S. Shoe. It became the property of the Treasury upon payment,

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[3] The $70 million figure is the most conservative estimate of the government's profits. Other estimates, which better account for the government's investment and spending of monies in the Trust Fund, place the figure in the hundreds of millions of dollars.

and was appropriated to the Harbor Maintenance Trust Fund along with" HMT payments by parties other than exporters. Pet. App. 8a. Moreover, according to the opinion below, the government's retention of proceeds on the unconstitutional tax was constitutional because the HMT itself "served the rational purpose of maintaining the ports": "'Congress mandated that fees collected from the HMT be used only for commercial navigation projects.'" *Id.* 9a (quoting Mayer, C.J., dissenting from Federal Circuit's holding in *U.S. Shoe I* that HMT violated the Export Clause).

4. The Federal Circuit denied rehearing *en banc* (Pet. App. 114a-115a) and this petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

This Court previously held in this case that the HMT violates the Export Clause of the Constitution. Certiorari should be granted because, although the government has begun refunding the principal, this case controls the disposition of thousands of other challenges to the government's failure to pay interest. At least $700 million is at stake. The government's own petition successfully urging this Court to grant plenary review in *U.S. Shoe I* emphasized the Court's practice of reviewing decisions of the Federal Circuit that are of such significant fiscal importance.

Review is furthermore warranted because the Federal Circuit's decision cannot be reconciled with the statutory text, the clear import of this Court's prior decision, or the government's own practice. Congress has broadly waived the government's immunity from interest under the customs and tax laws. Most obviously, Congress specified that the HMT shall be treated as a customs duty – a provision central to this Court's jurisdictional ruling in this case (Pet. App. 105a-06a) – and provided that refunds of customs duties shall include interest. 26 U.S.C. 4462(f); 19 U.S.C. 1505. The government has elsewhere conceded, both explicitly and by implication, that Section 1505 requires it to pay interest.

Finally, review is warranted to determine whether an express waiver of the government's immunity from interest is required at all. This Court has squarely held that no waiver is required when disgorgement of profits is in question. *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). Nonetheless, substantial disagreement remains on the issue, as shown by the four-to-two circuit conflict in the related context of the government's refund of monies that it has unlawfully forfeited. Further, precedents applying three constitutional provisions – the Export, Takings, and Due Process Clauses – establish that when the government unconstitutionally exacts monies, it must return not just the principal but also any proceeds that it actually earned during the period that it unlawfully held the principal. Indeed, the Export Clause is properly construed to confer a right to interest whether or not the government has earned any proceeds. These serious constitutional questions, of course, can and should be avoided by recognizing that Congress *has* waived the government's immunity from interest in this case.

I. Certiorari Should Be Granted In Light Of The Importance Of The Federal Circuit's Decision.

Congress enacted the Harbor Maintenance Tax in 1986, specifying that HMT assessments be deposited in a discrete trust fund where they would, in turn, be invested in interest-bearing securities. 26 U.S.C. 9505, 9602(b). Pursuant to the statute, many tens of thousands of exporters paid approximately $1.4 billion in taxes on their exports. The lost time-value of the exporters' money has reached more than $700 million. The government itself has earned on the principal, and deposited into the Trust Fund, at least $70 million.

Although thousands of exporters have still not received full refunds of the principal, at least that process began when this Court in 1998 unanimously invalidated the HMT as a violation of the Export Clause. Pet. App. 102a-10a. The government nonetheless insists that it has no obligation to provide exporters either statutory interest or the massive pro-

ceeds that it earned and continues to earn on the principal that it unlawfully exacted. The Federal Circuit approved that extraordinary result.

This case controls the approximately 7500 other claims that have been brought against the government, and thus controls the disposition of the more than $700 million in interest that is rightfully owed to the exporters. All the claims lie within the exclusive jurisdiction of the Federal Circuit. If the Court denies this petition for certiorari – together with the expected follow-on petitions of other exporters – it will effectively close the door on the rights of thousands of litigants.

The Court's practice in these circumstances has been to grant certiorari. The Solicitor General successfully made that point earlier in this very case, and the government's inevitable assertion that review is now not warranted will ring hollow with the sound of self-interest. Here as in *U.S. Shoe I* "[t]housands of cases" involving sums that "exceed several hundred million dollars" are at stake. No. 97-372, Pet. for Cert. 25. Jurisdiction on each claim "will lie exclusively [in] the Federal Circuit." *Id.* (citing 28 U.S.C. 1295(a)(3), (5)). In such a circumstance, the Solicitor General explained, "this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance." *Id.*[4]

Certiorari is warranted in this case in particular because, as petitioner now shows, the decision below cannot be recon-

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[4] The government cited: *United States* v. *Hill*, 506 U.S. 546 (1993) (interpreting 26 U.S.C. 56, 57(a)(8), which requires payment of a "minimum tax" on items above the "adjusted basis" of deposit interests); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132 (1989) (holding that "accumulated profits" in the indirect tax provision statute – 29 U.S.C. 902 – are to be measured by U.S., not foreign, principles of taxation); and *United States* v. *American Bar Endowment*, 477 U.S. 105 (1986) (interpreting the words "unrelated business income" in 26 U.S.C. 511-513, which subjects such income to taxation).

ciled with the statutory text, this Court's precedents, or the government's own practice.

II. Certiorari Should Be Granted Because The Federal Circuit Failed To Give Effect To Congress's Intent To Waive The Government's Immunity From Interest.

The Federal Circuit's decision in this case concludes that Congress failed to waive the government's immunity from interest in issuing refunds of the HMT. Yet the government was unable to offer, and the court of appeals failed to articulate, any *reason* for Congress to have adopted so strange a course – strange, given that it has so conspicuously, categorically, and comprehensively waived the government's immunity from interest with respect to both taxes and customs duties. Congress has conferred a broad right to interest on repayments by the Internal Revenue Service and the Customs Service, as well as on payments that the courts order either of those entities to make. See 19 U.S.C. 1505(b) ("The Customs Service shall * * * refund any excess moneys deposited, together with interest thereon."); 26 U.S.C. 6611(a) ("Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax * * *."); 28 U.S.C. 2411 ("In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed * * *."); *id.* § 2644 ("If, in a civil action in the Court of International Trade under [the administrative protest provision of the customs laws], the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed * * *."). To read the governing statutes as the government and the Federal Circuit would have this Court read them – *i.e.*, as reflecting an implicit intent to withdraw these broad waivers of immunity for this one important category of cases – is to attribute to Congress nothing short of utter caprice.

1. Congress most obviously conferred on exporters a right to interest on a refund of the HMT in 19 U.S.C. 1505. That statute provides in relevant part:

> 19 U.S.C. 1505(b). [R]efund of duties * * * and interest due upon liquidation or reliquidation. The Customs Service shall * * * refund any excess monies deposited, together with interest thereon, as determined on a liquidation or reliquidation.
>
> 19 U.S.C. 1505(c). Interest. Interest on excess moneys deposited shall accrue * * * from the date the importer of record deposits estimated duties, fees, and interest * * * to the date of liquidation or reliquidation of the applicable entry or reconciliation.

The Federal Circuit held that Section 1505 is inapplicable because it "contemplates an entirely different factual scenario from the one before us" in that the terms "importer of record," "liquidation," and "entry" do not apply to the taxation of exports pursuant to the HMT. Pet. App. 128a. The Federal Circuit's construction lacks merit.

a. If Section 1505 did not apply to the HMT on exports, then the government would lack any statutory mechanism prescribing the manner in which it should *refund the principal*, whether in the event of an administrative overassessment, an inadvertent overpayment, or (as here) an unconstitutional tax. That cannot be so. Section 1505(b) thus provides statutory authority for a refund, together with interest, in one breath; both stand or fall together: "The Customs Service shall * * * refund any excess monies deposited, together with interest thereon, as determined on a liquidation or reliquidation."

Even the government concedes that Congress could not have intended such a result. The Customs Service thus adopted regulations providing for refunds. See 19 C.F.R. 24.24(e)(4) (2000 and 2001). The proposed regulations all relied in pertinent part on *Section 1505*. 67 Fed. Reg. 31,948 (May 13, 2002); 66 Fed. Reg. 16,854 (Mar. 28, 2001); 66 Fed. Reg. 21,086 (Apr. 27, 2001); 66 Fed. Reg. 34,813 (July 2, 2001). This concession that Section 1505 authorizes re-

funds of the HMT to exporters necessarily carries the further concession that interest is available as well, for (as noted) the latter follows automatically from the former according to the plain text of the statute.[5]

b. The Federal Circuit's construction is furthermore unsupportable because it flouts Congress's design of the HMT in general and 26 U.S.C. 4462(f) in particular. Rather than enacting a broad new regulatory scheme or amending all of the customs laws to account for the HMT, Congress provided that the tax would be collected, disbursed, and refunded through "[e]xtension of provisions of law applicable to customs dut[ies]." 26 U.S.C. 4462(f) (title). In particular: "*all* administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * *as if such tax were a customs duty*." *Id.* § 4462(f)(1) (emphases added).

There is no dispute that Section 1505 is an "administrative and enforcement provision of the customs laws." Section 1505, entitled "Payment of duties and fees," is codified in Chapter 4 of Title 19, which sets forth the "[a]dministrative [p]rovisions" (title) of the customs laws. Yet the court of appeals inexplicably failed to follow Congress's direction to apply Section 1505 "as if [the HMT] were a customs duty." If it

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[5] The first three Federal Register notices cited only Section 1505. The final version included an unexplained further citation to 19 U.S.C. 1520, but that statute does not support the Federal Circuit's decision. Because Congress directed that the HMT be treated as a customs duty, a refund could be available under Section 1520 only if "it is ascertained *on liquidation or reliquidation of an entry or reconciliation* that more money has been deposited or paid as duties than was required by law to be so deposited or paid." *Id.* § 1520(a)(1) (emphasis added). Thus, to the extent the government relies on Section 1520 as authority for issuing refunds, it must concede that the provisions of the customs laws apply to the HMT notwithstanding that they contemplate "liquidation or reliquidation" and the existence of "an entry or reconciliation."

had heeded that command, the court of appeals would have found that exporters have a right to interest. The terms that the Federal Circuit found critical in Section 1505 – "importer," "liquidation," "entry," and "reconciliation" – appear throughout the administration and enforcement provisions of the customs laws and regulations because they govern the payment *of customs duties*. See 19 U.S.C. 1500; 19 C.F.R. 19.12 (providing for reconciliations); *id.* § 141.0a(a) (defining entry); *id.* § 159.1 (defining liquidation).

That is precisely the reasoning underlying this Court's jurisdictional holding in *U.S. Shoe I*. This Court in *U.S. Shoe I* affirmed the Federal Circuit's determination that jurisdiction is proper under 28 U.S.C. 1581(i), which grants the CIT "exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States providing for * * * revenue from imports" or other duties or restrictions on "the importation of merchandise." *Id.* § 1581(i)(1)-(3). In reaching that conclusion, this Court found that Section 4462(f)(2) made Section 1581(i)'s reference only to "imports" immaterial:

> True, § 1581(i) does not use the word "exports." But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting. In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§] 1581(i)(1)."

Pet. App. 106a (quoting Pet. App. 46a).

The very purpose of Section 4462(f) is thus to ensure that the substantive and jurisdictional provisions of the customs laws govern the HMT notwithstanding that the tax applies to exporters, not merely "importers," and in that respect does not

call for an "entry," a "liquidation," or a "reconciliation." Congress intended that the courts ignore those differences in applying the customs laws so that it could avoid revising those statutes wholesale.

It is therefore clear that Section 1505(b) uses the words "on a liquidation or reliquidation" simply to refer to the ordinary method of calculating a refund, with interest, of duties on imports – the duties to which the customs laws usually apply. Pet. App. 130a. There is no reason to believe Congress intended to permit Customs to circumvent its duty to pay a refund and interest by employing a particular *method* to collect the HMT or determine the amount owed to the exporter. This case is a perfect example: no technical mechanism need (or logically would) be used to determine the amount owed because this Court has held that every single cent exacted pursuant to the HMT is unconstitutional as applied to exports. To the extent the timing provision of Section 1505(c) is inapplicable, that is no obstacle to an award of otherwise-owing interest, which obviously runs from the date the government received the principal.[6]

Indeed, the Customs Service itself acknowledged – outside the self-interested context of this litigation – that Section 4462 unmistakably commanded that interest be available under Section 1505. After Congress adopted Section 1505 in its current form, Customs issued a draft notice of proposed rulemaking setting forth its views on how the statute applied to other customs laws. See Pet. 140a-43a (excerpting relevant

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[6] At the very least, Customs was compelled under 26 U.S.C. 4462(f)(1) to utilize the standard tools of "entries" and "liquidations" in calculating and collecting the HMT because Congress directed Customs to administer the HMT as if it "were a customs duty." See 19 U.S.C. 1500. Customs cannot use its own failure to follow that clear command to frustrate Congress's intent to award interest.

provisions).[7] Customs acknowledged that, in light of Section 4462, "section [1505] interest principles [apply] * * * even where the final amount of the required fee payment *is not finally determined in connection with a liquidation or reliquidation.*" *Id.* 141a (emphasis added). Customs thus acknowledged that it was "*required* to apply the rules and principles of section [1505]" to the HMT because it "believe[d] that section [1505] is one of the customs laws which by Congressional *mandate* applies to the fees and taxes Customs collects pursuant to [the HMT]." *Id.* (emphases added). Customs specified that this conclusion included the application of Section 1505's "interest provisions to * * * the port use (harbor maintenance) fee applicable * * * to the export * * * of merchandise," such that "interest accrues on overpayments of all fees from the date the fee was deposited with Customs." *Id.* 141a-142a.

2. Congress separately waived the government's immunity from interest in a provision of the Judicial Code, 28 U.S.C. 2411. That statute provides: "In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed * * *."

The Federal Circuit did not doubt that "the structure and the content of the HMT point toward it being an internal revenue tax, and thus entitled on refund to the interest award provided under § 2411." Pet. App. 123a. The court of appeals thus recognized that the Harbor Maintenance *Tax* is

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[7] During the appellate proceedings in *U.S. Shoe I*, Customs withheld action on the notice. After this Court's decision invalidating the HMT, Customs issued a new proposed rulemaking but omitted its prior acknowledgment of a right to interest. 64 Fed. Reg. 56,433 (Oct. 20, 1999). Petitioner is including the original draft notice in the appendix because Customs appears to have deleted the document from its electronic bulletin board during the course of the appellate litigation over the right to interest on HMT refunds.

codified in the Internal Revenue Code and "is clearly derived from internal sources — the U.S. exporter." *Id.* The Federal Circuit nonetheless held that interest is not available in light of 26 U.S.C. 4462(f)(3). That statute provides that the HMT "shall not be treated as a tax for purposes of subtitle F [of the Internal Revenue Code] or any other provision of law relating to the administration and enforcement of internal revenue taxes." The court of appeals acknowledged that Section 2411's provision for the award of interest is codified in the Judicial Code, not the Internal Revenue Code, but held that Section 2411 "relates to the administration and enforcement" of taxes, which it defined to mean "enforcement of the tax laws, including the obtaining and enforcement of judgments against both taxpayers and the United States." Pet. App. 125a.

The court of appeals erred because it failed to recognize the limited role of Section 2411. That statute is not a directive to the Internal Revenue Service to award refunds, nor does it implement any provision of law contained in the Internal Revenue Code. Rather, it is a separate authorization in the Judicial Code for courts to include interest on refunds that they award to taxpayers. The statute merely provides that "[i]n any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed * * *." 28 U.S.C. 2411. Section 2411 is thus not a "provision of law relating to the administration and enforcement of internal revenue taxes" (26 U.S.C. 4462(f)(3)).

That conclusion is apparent from the contrast between Section 2411 and those statutes that direct agencies to award refunds with interest. Thus, 26 U.S.C. 6611 governs the IRS directly and provides: "Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax * * *." In addition, 19 U.S.C. 1505, discussed *supra*, directs the Customs Service specifically to award refunds and interest in certain circumstances. Both 26 U.S.C. 6611 and 19 U.S.C. 1505 are thus properly understood to "relate to the admini-

stration and enforcement" of, respectively, the tax and customs laws.

For the foregoing reasons, Sections 1505 and 2411 confer upon exporters a right to interest. Congress clearly intended that interest be paid on both illegally collected taxes and illegally assessed customs duties. As a drafting short-cut, Congress shunted certain questions regarding its Harbor Maintenance Tax to provisions of the customs laws. Those provisions refer only to import duties, not export duties, because the latter violate the Constitution. From this the government and the court below conclude that Congress, which repeatedly indicated its wish that interest be paid on illegal exactions, has not succeeded in ordering payment of interest on illegally exacted export duties by any route. This Court rejected such a Catch-22 interpretation in respect to the CIT's jurisdiction in *U.S. Shoe I* and should reject it here as well.

But even if the Court were to conclude that Congress did not waive the government's immunity and thus inadvertently permitted the utterly unjust outcome reached below, certiorari would be warranted to decide a second question: is the "no-interest" presumption even applicable here? As petitioner now shows, the answer to that question is "no," and this Court should furthermore recognize the inapplicability of sovereign immunity to the award of interest in such cases so as to avoid the substantial constitutional questions that would otherwise arise. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

III. Certiorari Should Be Granted To Determine Whether A Waiver Of The Government's Immunity From Interest Is Required.

1. The Federal Circuit rejected the argument that the Export Clause itself requires the payment of interest as part of the compensation for the government's flat violation of the Export Clause. In particular, the court of appeals found dispositive the fact that, unlike the Export Clause, the Takings Clause includes "the restorative clause, 'without just compen-

sation.'" Pet. App. 11a. That decision conflicts with the text of the Export Clause and with this Court's precedents. As this Court has concluded on the basis of the text and history, "the original impetus may have had a narrow focus, [but] the *remedial provision* that ultimately became the Export Clause *does not*." *United States* v. *IBM Corp.*, 517 U.S. 843, 859-60 (1996) (emphases added).

The Constitution's Export Clause is categorical. Its "simple, direct, unqualified prohibition on any taxes or duties," this Court previously explained in this case, "distinguishes it from other constitutional limitations on governmental taxing authority." Pet. App. 108a. Although the framers in other provisions mandated, for example, "*just* compensation" (U.S. CONST. amend. V) and "*due* process" (*id.*), in the Export Clause they clearly and succinctly commanded: "*No* Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl. 5. The "proponents of the Clause fully intended the breadth of scope that is evident in the language." *IBM*, 517 U.S. at 859-60. The framers could not have intended the categorical prohibition of the Constitution's text against any export tax to have *less* force and effect than the Fifth Amendment's more permissive provision allowing the taking of private property so long as just compensation is provided.

The categorical text of the Export Clause reflects the framers' expansive purposes. Although some favored crafting a provision that more narrowly would prevent the government from using exports as a source of general tax revenues, a broader conception of the Clause as a protection of exports prevailed. More than a century ago, this Court explained:

> [T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue" but the motion was

> voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

Fairbank v. *United States*, 181 U.S. 283, 292-93 (1901). As this Court previously concluded in this case, the framers responded to the "concern[] that Northern States would tax exports to the disadvantage of Southern States by *completely* denying to Congress the power to tax exports *at all*." Pet. App. 108a (quoting *IBM*, *supra* 517 U.S. at 861) (emphasis added).

The Federal Circuit's decision runs contrary to both of these purposes of the Export Clause recognized in *Fairbank*. The government's retention of the proceeds earned while the funds paid by exporters have been held in the Harbor Maintenance Trust Fund manifestly constitutes a prohibited "source of revenue to the National Government." *Fairbank*, 181 U.S. at 292. Further, the government's failure either to pay interest as the lost time-value of the exporters' money or to disgorge the proceeds actually earned would be a profound "burden upon such exports." *Id.* at 293. The Export Clause prohibits restraining exports through even $1 in taxation. It cannot seriously be imagined that the Clause permits exporters to suffer the burden of effectively losing the value of *$700 million* as a result of an admittedly unconstitutional tax on exports.

Finally, the Federal Circuit's textual reasoning produces absurd results. The court took an "*expressio unius*"-like approach to the fact that only the Takings Clause has a "just compensation" requirement. That reasoning attributes to the framers the intent that the Constitution's other clauses prohibiting the government from seizing funds in certain circumstances – including not only the Export Clause but also the Import/Export Clause – provide the victims of the government's unconstitutional acts either no refund *at all* or, at most, compensation that is less than "just." That is absurd, and

even the Federal Circuit has previously held that "[t]he necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted. * * * [A]bsent a prompt restoration of [such] money * * *, the Export Clause would be more hollow than real because in the event that Congress imposed export taxes, equitable relief alone could not ameliorate the harm." *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369, 1373-74 (2000), *cert. denied*, 532 U.S. 1065 (2001).

2. At the very least, no express waiver of the government's immunity is needed when the government is required to refund *significant profits that it has actually earned* on unlawful exactions. See *Henkels* v. *Sutherland*, 271 U.S. 298 (1926). In *Henkels*, the federal government unlawfully seized the petitioner's securities pursuant to the Trading with the Enemy Act, sold the securities, and deposited the proceeds into an interest-bearing account where they were commingled with other monies. This Court held the petitioner was entitled not only to a refund but also to the government's earnings from investing the sale of his securities. *Id.* at 301.

The Court recognized the basic rule that "[t]he Government cannot be sued without its consent; and, accordingly, it cannot be sued for interest unless it consents to be liable therefor." 271 U.S. at 301. But the Court explained that "the claim here is not for interest to be paid by the United States in the sense of the [no-interest] rule. It is for income, derived from an investment of Henkels' money in obligations of the United States, which income has been actually received by the Treasury and is in its possession * * *." *Id.* The government "cannot confiscate the actual increment of property belonging to a citizen * * * any more than it can confiscate the property or its proceeds, without coming into conflict with the Constitution." *Id.*

The Sixth and Ninth Circuits have reached the same conclusion and would require the government to disgorge the proceeds it earns. Those courts would reason that "the inter-

est earned on the money in an interest-bearing account would become part of, and would be substituted for (along with the original amount) the *res*." *United States* v. *$277,000*, 69 F.3d 1491, 1496 (CA9 1995). On this question, "the circuits are split" (*United States* v. *$30,006.25*, 236 F.3d 610, 613 (CA10 2000)) four-to-two. Accord U.S. C.A. Br. 46 ("the courts are split").[8] Although the appellate decisions giving rise to the conflict arose from unlawful forfeitures – and Congress has recently provided for the award of interest in that specific circumstance (28 U.S.C. 2465(b)(1)(C)) – the conflict is applicable generally to all unlawful exactions of money. *E.g.*, *E. W. Scripps Co.* v. *United States*, 2002 U.S. Dist. LEXIS 20283 (S.D. Ohio Sept. 16, 2002) (holding that right to interest on refund of tax overpayment existed under Sixth and Ninth Circuits' view that no waiver of immunity is required). Although no challenge to the HMT can actually arise in the Sixth or Ninth Circuits, it is a testament to the seriousness of the issue that two courts of appeals would hold that petitioner has a right to the proceeds earned by the government on petitioner's HMT payments.

This case presents the strongest possible circumstance for holding that no waiver of the government's sovereign immunity from interest is required where the government has realized actual proceeds, because a contrary ruling (such as the holding of the Federal Circuit in this case) would raise serious constitutional questions. Precedents under three constitu-

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[8] The Sixth and Ninth Circuits hold that no waiver is required. *United States* v. *$515,060.42*, 152 F.3d 491, 504-06 (CA6 1998); *United States* v. *$277,000*, 69 F.3d 1491 (CA9 1995); see also *United States* v. *$133,735.30*, 139 F.3d 729, 731-32 (CA9 1998); *United States* v. *$40,000*, 1998 U.S. Dist. LEXIS 14649 (D.P.R. Sept. 1, 1998). The First, Second, Eighth, and Tenth Circuits disagree. *Larson* v. *United States*, 274 F.3d 643 (CA1 2001); *$30,006.25*, 236 F.3d at 614-15; *United States* v. *$7,990*, 170 F.3d 843, 845-46 (CA8 1999); *Ikelionwu* v. *United States*, 150 F.3d 233, 238-39 (CA2 1998).

tional provisions – the Export, Takings, and Due Process Clauses – establish that exporters have a *constitutional* right to the proceeds earned by the government on the HMT funds.

In addition to the authorities cited above under the Export Clause, petitioner presents a substantial argument that the government is required by the Takings and Due Process Clauses to disgorge the proceeds it actually earned on the HMT. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980); *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring) (distinguishing challenge to general tax from claimed right to "accrued interest"). The Federal Circuit rejected those arguments on the ground that "[t]he tax revenue here was not held by the government as property of U.S. Shoe. It became the property of the Treasury upon payment, and was appropriated to the Harbor Maintenance Trust Fund along with" HMT payments by parties other than exporters. Pet. App. 8a. Furthermore, the HMT "served the rational purpose of maintaining the ports": "'Congress mandated that fees collected from the HMT be used only for commercial navigation projects.'" *Id.* 9a (quoting Mayer, C.J., dissenting from Federal Circuit's holding in *U.S. Shoe I* that HMT violated the Export Clause).

The Federal Circuit's reasoning is open to serious question and merits further review. As a constitutional matter, the court of appeals certainly erred in relying on the fact (Pet. App. 8a) that the government "held" the HMT payments as its own rather than as the property of the exporters. Although the HMT payments were in the government's hands, and the government refused to acknowledge their rightful ownership, the money plainly was the "property" of the exporters all along. That is so because the government's action was unconstitutional, and "what a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case '*disregarding the [unconstitutional] law*,' because a law repugnant to the Constitution 'is void, and is as no law.' *Reynoldsville Casket Co.* v. *Hyde*, 514 U.S. 749, 760 (1995)

(Scalia, J., concurring) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1880); *Ex parte Siebold*, 100 U.S. 371, 376 (1880)) (emphases and alteration in original). Cf. *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 320 (1987) (rejecting the argument that "no compensable regulatory taking may occur until a challenged ordinance has ultimately been held invalid").

The Federal Circuit next relied on the fact that, although the Harbor Maintenance Trust Fund by statute contains only HMT payments and the proceeds earned by the government on those payments (see 26 U.S.C. 9505, 9602(b)), the HMT was not paid exclusively by exporters. Pet. App. 8a. This Court's jurisprudence, however, has never attributed such controlling significance to the concept of a "discrete fund," which on the Federal Circuit's view is an invitation to the government to circumvent the Fifth Amendment by submerging all exacted funds within some larger account.

Finally, it is no answer to petitioner's argument that Congress had a "rational purpose of maintaining the ports" (Pet. App. 9a) when it enacted the HMT. This is not a case in which government action is challenged on the single ground of "irrationality," as would be the case if petitioner argued that the HMT bore no rational relationship to preservation of the port system. Petitioner instead argues that the Constitution does not permit the government to profit from its utterly unconstitutional conduct. When the government has employed unconstitutional *means*, it is no defense that its purpose was entirely legitimate. The Fifth Amendment thus does not permit the government to "take" private property without just compensation for a "rational" reason. Nor is the protection against "arbitrary" government action provided by the Due Process Clause (*e.g.*, *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986); *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972)) – which is surely implicated when the government seeks to profit enormously from its own unlawful conduct to the detriment of individuals forced to pay an unconstitutional tax –

vitiated by the fact that the government had a "rational" reason for wanting to violate the Constitution.

Put another way, the Federal Circuit addressed the wrong question. The pertinent question for purposes of the Takings and Due Process Clauses is not whether the tax itself was arbitrary, but instead, *once it was determined that the assessment was unconstitutional*, whether there would be any rational, nonarbitrary basis for the government to retain the proceeds it made from its investment of that unconstitutional assessment, where the legislature itself regularly recognizes, in analogous contexts, that equity requires the return of such benefits to the innocent taxpayer. There is no such rational basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 19, 2003

APPENDIX

UNITED STATES SHOE CORPORATION,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

No. 98-1574

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

296 F.3d 1378; 2002 U.S. App. LEXIS 14776;
2002-2 U.S. Tax Cas. (CCH) P70,186;
90 A.F.T.R.2d (RIA) 5376

July 23, 2002, Decided

SUBSEQUENT HISTORY:

Rehearing En Banc Denied October 22, 2002, Reported at: 2002 U.S. App. LEXIS 23176.

PRIOR HISTORY:

Appealed from: United States Court of International Trade. Judge Jane A. Restani. *United States Shoe Corp. v. United States*, 22 Ct. International Trade 613, 1998 Ct. Intl. Trade LEXIS 76, (1998)

DISPOSITION: REVERSED.

COUNSEL:

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Jeffrey A. Belkin, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director; Jeanne E. Davidson, Deputy Director; and Todd M. Hughes, Assistant Director. Of counsel on the brief was Richard McManus, Office of the Chief Counsel, United States Customs Service, of Washington, DC. Of counsel was Lara Levinson, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC.

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JUDGES:

Before MAYER, Chief Judge, RADER and BRYSON, Circuit Judges.

OPINION BY:

MAYER

OPINION:

MAYER, Chief Judge.

The United States appeals the judgment of the Court of International Trade granting United States Shoe Corporation's motion for payment of interest on its refund of the Harbor Maintenance Tax. *United States Shoe Corp. v. United States*, 22 C.I.T. 613, 20 I.T.R.D. (BNA) 1703 (Ct. Int'l Trade 1998). Because the payment of interest is not mandated by statute or the Constitution, we reverse.

Background

The Harbor Maintenance Tax was enacted by Congress as part of the Water Resources Development Act of 1986. 26 U.S.C. §§ 4461-4462 (2000). It levied a 0.125 percent ad valorem tax on commercial cargo for any port use. *Id.* § 4461(b). In 1995, the Court of International Trade decided that the tax imposed on exports was unconstitutional because it violated the Export Clause's mandate that "no Tax or Duty shall be laid on Articles exported from any State," U.S. Const. art. I, § 9, cl. 5. See *United States Shoe Corp. v. United States*, 19 C.I.T. 1284, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The court then decided that in addition to a refund of the tax payment, interest was due pursuant to 28 U.S.C. § 2411. *United States Shoe Corp. v. United States*, 20 C.I.T. 206 (Ct. Int'l Trade 1996). The award of interest was stayed until appellate proceedings on the constitutionality of the tax were complete.

On appeal, this court agreed that the tax was unconstitutional, *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), and the Supreme Court affirmed, stating that the tax "is not a fair approximation of services, facilities, or benefits furnished to exporters, and therefore does not qualify as a permissible user fee," *United States v. United States Shoe Corp.*, 523 U.S. 360, 363, 140 L. Ed. 2d 453, 118 S. Ct. 1290 (1998). The stay on the payment of interest dissolved, and pur-

suant to its 1996 judgment, the Court of International Trade awarded U.S. Shoe interest. The United States asks that we reverse the judgment. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

Discussion

We review statutory interpretation by the Court of International Trade without deference. *Saarstahl AG v. United States*, 78 F.3d 1539, 1542 (Fed. Cir. 1996). Constitutional interpretation is also a question of law, which we review de novo. *Florida Sugar Mktg. & Terminal Ass'n, Inc. v. United States*, 220 F.3d 1331, 1333 (Fed. Cir. 2000). A court may fashion equitable remedies, but it may not abuse its discretion in doing so. *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000). An equitable remedy here must not be (1) clearly unreasonable, arbitrary or fanciful or (2) based on an erroneous conclusion of law. *Institut Pasteur & Genetic Sys. Corp. v. Cambridge Biotech Corp.*, 186 F.3d 1356, 1369 (Fed. Cir. 1999).

Interest may only be recovered in a suit against the government if there has been a clear and express waiver of sovereign immunity by contract or statute, or if interest is part of compensation required by the Constitution. *Library of Congress v. Shaw*, 478 U.S. 310, 311, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986); *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 47, 73 L. Ed. 170, 49 S. Ct. 52 (1928). U.S. Shoe argues that interest is due on its payment of the Harbor Maintenance Tax under (1) statutory provisions providing for the payment of interest, (2) the Takings and Export Clauses of the Constitution, and (3) the discretionary power of a court to fashion equitable remedies.

I.

The government argues that the Court of International Trade erred in awarding U.S. Shoe interest because the United States has not expressly consented to such an award, relying on *International Business Machines Corp. v. United States*, 201

F.3d 1367, 1374 (Fed. Cir. 2000). We agree. IBM looked to the statutes which waived immunity to pay interest and concluded that neither a tax related statute, 28 U.S.C. § 2411, nor customs related statutes, 28 U.S.C. § 2644 and 19 U.S.C. § 1505, permitted the award. *Id.*

First, 28 U.S.C. § 2411 provides: "In any judgment of any court rendered ... for any overpayment in respect of any internal-revenue tax, interest shall be allowed from the date of the payment" *IBM* held that the Harbor Maintenance Tax statute, 26 U.S.C. § 4462, expressly prohibited the application of section 2411 because it is a tax law, and not a customs law. 201 F.3d at 1372. Section 4462(f)(1) states that "all administrative and enforcement provisions of customs laws and regulations shall apply .. as if such tax were a customs duty." "Administration and enforcement" encompass the "assessment and collection of tax payments and issuance of refunds and interest on those refunds." 201 F.3d at 1372. Because section 2411 does not apply to refunds of the tax, *id.* at 1373, the Court of International Trade improperly awarded U.S. Shoe interest under it.

Second, 28 U.S.C. § 2644 provides for post-summons interest for claims that invoke the Court of International Trade's jurisdiction under 28 U.S.C. § 1581(a). For review under this subsection, a party must have filed a protest under section 515 of the Tariff Act of 1930. 28 U.S.C. § 1581(a) (2000). In IBM, section 1581(a) jurisdiction was not invoked because IBM did not file a customs protest; therefore section 2644 interest could not be awarded. 201 F.3d at 1374. Instead, jurisdiction in IBM arose under section 1581(i), the residual jurisdiction provision. *Id.* Likewise in this case, the Supreme Court held that jurisdiction was proper under section 1581(i), *U.S. Shoe*, 523 U.S. at 365, thereby prohibiting an award of section 2644 interest.

Third, 19 U.S.C. § 1505 provides for prejudgment interest, and states in relevant part that "interest on excess moneys deposited shall accrue ... from the date the importer ... deposits estimated duties, fees, and interest ... to the date of liquidation

or reliquidation of the applicable entry or reconciliation [of the imports]." 19 U.S.C. § 1505(c) (emphases added). IBM held that section 1505(c) does not apply to exports because it speaks only to imports and declined to rewrite the "Congressional enactment to make it fit a case for which it was clearly not intended." 201 F.3d at 1374.

U.S. Shoe and amicus argue that IBM's interpretation is too restrictive, and that section 1505(c) should apply to exports as well as imports. They rely by analogy on the Supreme Court's holding that review of the Harbor Maintenance Tax on exports could be heard under the Court of International Trade's jurisdictional statute, section 1581(i), referring only to imports: "True, § 1581(i) does not use the word 'exports.' But that is hardly surprising in view of the Export Clause, which confines customs duties to imports." *U.S. Shoe*, 523 U.S. at 366. U.S. Shoe urges that "exports" be read into section 1505(c) also. The Court, however, was reviewing the entire statute, and the tax on imports provided a sufficient basis for jurisdiction because the "HMT statute, although applied to exports here, does apply equally to imports." *Id.* We believe the Court's reasoning is sound for the purpose of establishing jurisdiction, but an insufficient basis upon which sovereign immunity may be waived in light of the "Supreme Court's mandate that Congress must expressly consent to an award of interest." *IBM*, 201 F.3d at 1374.

II.

The government also argues that the Constitution does not mandate the payment of prejudgment interest. We agree. The Harbor Maintenance Tax was not a taking, but a violation of the Export Clause, for which no prejudgment interest is due. If not granted by statute, the Supreme Court has held only the Fifth Amendment of the Constitution to mandate the payment of interest. *Shaw*, 478 U.S. at 317 n.5; *Smyth v. United States*, 302 U.S. 329, 353-54, 82 L. Ed. 294, 58 S. Ct. 248 (1937); *Boston Sand & Gravel*, 278 U.S. at 47. The Fifth Amendment states that private property shall not be "taken for public use, without just compensation." U.S. Const. amend. V. The princi-

ple that the "just compensation" language includes the payment of interest from the time of the taking is long standing. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306, 67 L. Ed. 664, 43 S. Ct. 354 (1923) ("The requirement that 'just compensation' shall be paid is comprehensive ... and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.").

U.S. Shoe argues that the Harbor Maintenance Tax was a taking in violation of the Fifth Amendment because it was an unlawful confiscation of its property. We do not agree. The government's act of taxation here was not a per se taking of private property. *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989) (considering and rejecting the view that money is private property that can be physically occupied by the government: "Unlike real or personal property, money is fungible."). Nor is the tax a regulatory taking: "Regulatory actions requiring the payment of money are not takings." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc) (relying on the reasoning of five justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998)); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property.").

A "reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *Sperry*, 493 U.S. at 63. The Harbor Maintenance Tax was imposed to "defray the cost of harbor development and maintenance." *U.S. Shoe*, 523 U.S. at 370. In *Pace v. Burgess*, 92 U.S. 372, 375, 23 L. Ed. 657 (1875), a stamp fee placed on packages of tobacco for export was upheld because it "bore no proportion whatever to the quantity or value of the package on which it was affixed" and was not excessive. Here, the fee was declared unconstitutional because it was proportional to the value of the exported goods and not the actual use of the harbors. *U.S. Shoe*, 523 U.S. at 369 ("The connection between a service the Government renders and the compensation it receives for that service must

be closer than is present here ... the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires."). But it was not excessive. Under *Sperry*, a user fee of 1.5 percent "does not qualify as a 'taking' by any standard of excessiveness." 493 U.S. at 62. Similarly, purely by its amount, 0.125 percent, 26 U.S.C. § 4461(b) (2000), the Harbor Maintenance Tax must be considered reasonable. Because "the Takings Clause is less restrictive than the Export Clause," *U.S. Shoe*, 523 U.S. at 369, and the tax would be sustained if it "fairly matched the exporters' use of port services and facilities," *id.* at 370, we conclude that the tax did not rise to the level of a taking.

U.S. Shoe also contends that the government's retention of the interest income earned on the tax revenue is a continuing taking. But U.S. Shoe has not established a private property right in the interest generated by the payment of the tax. See *Eastern Enterprises*, 524 U.S. at 543 (Kennedy, J., concurring). The Harbor Maintenance Tax did not "appropriate, transfer, or encumber an estate in land ..., a valuable interest in an intangible ..., or even a bank account or [its associated] accrued interest." *Id.* at 540. For the accrued interest to rise to the level of private property, the principal must be held in an identified private account. See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998) (stating that client fees held in trust accounts constituted "private property"). And then any interest accrued belongs to the owner of the principal. *Id.* at 172 (holding that the "interest income generated by funds held in IOLTA accounts [client accounts] is the 'private property' of the owner of the principal"). The tax revenue here was not held by the government as property of U.S. Shoe. It became the property of the Treasury upon payment, and was appropriated to the Harbor Maintenance Trust Fund along with user fees on imports, passenger cruise ships, and domestic shipments, and other statutory fees. 26 U.S.C. § 9505(b) (2000). Accordingly, the interest earned on the tax

payments is also the property of the government. And its use for harbor maintenance expenditures, *id.* § 9505(c), cannot be a taking.

U.S. Shoe also argues that the Harbor Maintenance Tax was so arbitrary that it was an egregious violation of due process, and therefore a taking. See *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24-25, 60 L. Ed. 493, 36 S. Ct. 236 (1916) ("Although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking ...."). We do not agree. The tax was not arbitrary because it served the rational purpose of maintaining the ports. See *U.S. Shoe*, 114 F.3d at 1579 (Mayer, C.J., dissenting) ("Congress mandated that fees collected from the HMT be used only for commercial navigation projects."); see also *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 547, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (White, J., dissenting on other grounds) (statutes restrictive of liberty must have "an ascertainable purpose and represent a rational means to achieve that purpose ...."). The Court struck down the tax because it was improperly calculated, not because its purpose was unascertainable or nefarious. *U.S. Shoe*, 523 U.S. at 363, 370 (The tax was not "a fair approximation of services, facilities, or benefits furnished to the exporters," but "this does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance."). Moreover, the tax cannot be a taking because the Supreme Court determined that the tax violated the Export Clause, not the Takings Clause. *Id.* at 368 ("Those decisions [discussing user fees] [including *Sperry*, a takings case] involved constitutional provisions other than the Export Clause, however, and thus do not govern here.").

In the alternative, U.S. Shoe argues that the Export Clause mandates the payment of interest. It cites *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000), that a claim against the government for a violation of the Export

Clause is money mandating, and requires "a return of money unlawfully exacted." *Cyprus Amax*, however, was premised on the award of money damages to U.S. Shoe "equaling the amount exacted under the HMT" only, *id.* at 1374; *U.S. Shoe*, 114 F.3d at 1577, and does not discuss, nor stand for the proposition that interest must be awarded.

U.S. Shoe also relies on *Hatter v. United States*, 38 Fed. Cl. 166 (1997), to assert that violations of constitutional clauses other than the Takings Clause require the payment of interest. In *Hatter*, the Court of Federal Claims decided that judges were due interest on money owed because of an Article III Compensation Clause violation. *Id.* at 183. See also *Hatter v. United States*, 64 F.3d 647, 653 (Fed. Cir. 1995), aff'd in part, rev'd in part, *Hatter v. United States*, 532 U.S. 557, 149 L. Ed. 2d 820, 121 S. Ct. 1782 (2001) (affirming that discriminatory taxes imposed on sitting judges violated the Compensation Clause). The interest issue, however, was not appealed by the government, and the final judgment of the Court of Federal Claims is not binding upon us. *Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993). Even if interest is mandated under the Compensation Clause, the reasoning upon which this conclusion is based does not extend to the Export Clause.

Under the Compensation Clause, "Judges ... shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. The construction of the Export Clause differs from the Compensation Clause. The Export Clause is prohibitive, "No Tax or Duty shall be laid on Articles exported from any State," U.S. Const. art. I, § 9, cl. 5, while the Compensation Clause requires that judges shall receive "Compensation." Such "Compensation" must be paid at "stated Times," indicating that if it is not paid when due, interest should be paid to compensate for the delay. *Hatter*, 38 Fed. Cl. at 183. And the rationale, that the government should pay interest if it un-

unlawfully withholds judges' pay to maintain the separation of powers, does not apply to the Export Clause. *Id.*

Like the Export Clause, the Takings Clause is also prohibitive, "nor shall private property be taken for public use," but it is coupled with the restorative clause, "without just compensation." U.S. Const. amend. V. The Export Clause's prohibition lacks similar remedial language. U.S. Shoe asserts, nevertheless, that the Supreme Court's reasoning in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326, 37 L. Ed. 463, 13 S. Ct. 622 (1893), reading "compensation" to require the "full and perfect equivalent for the property taken," and its subsequent interpretation that such compensation requires the payment of interest, *Seaboard Air Line*, 261 U.S. at 305-06, applies to the Export Clause. And because a violation of the Export Clause requires a return of the money excised, its perfect equivalent entails both principal and interest. We are unwilling to import the Court's interpretation of "Compensation" into the Export Clause where the word "compensation" does not appear. Instead, we prefer to "follow the express textual command of the Export Clause." *United States v. Int'l Bus. Machs.*, 517 U.S. 843, 862, 135 L. Ed. 2d 124, 116 S. Ct. 1793 (1996); see also *id.* at 857 ("We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. ... Meaningful textual differences exist and should not be overlooked.").

III.

Finally, the government argues that principles of equity are insufficient to waive the government's sovereign immunity. We agree. The equitable doctrine of restitution and unjust enrichment are powerful remedies of fairness. But true to the "no-interest rule," under which a waiver of sovereign immunity for an award of interest must be affirmative and unequivocal, *Shaw*, 478 U.S. at 311, the foregoing analysis demonstrates that a judge-fashioned remedy here would be an abuse of discretion. See *IBM*, 201 F.3d at 1374; *Kalan, Inc. v. United States*, 944

F.2d 847, 850 (Fed. Cir. 1991) ("Neither we nor the Court of International Trade can supply by creative interpretation the necessary clear direction [to award interest] that Congress omitted.").

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed.

UNITED STATES SHOE CORP.
Plaintiff,
v.
THE UNITED STATES
Defendant.

Court No. 94-11-00668

UNITED STATES COURT OF INTERNATIONAL TRADE

20 C.I.T. 206; 1996 Ct. Intl. Trade LEXIS 45; SLIP OP. 96-32

February 7, 1996, Dated

DISPOSITION:

Interest on HMT payments challenged pursuant to 28 U.S.C. § 1581(i) may be awarded pursuant to 28 U.S.C. § 2411.

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JUDGES:

Jane A. Restani, Judge

OPINION BY:

Jane A. Restani

OPINION:

MEMORANDUM OPINION

RESTANI, Judge: The judgment in this action awarded plaintiff $ 8,281.87, "together with interest and costs as provided by law." *U.S. Shoe Corp. v. United States*, 924 F. Supp. 1191, 1995 Ct. Intl. Trade LEXIS 247, Slip Op. 95-197 (Dec. 4, 1995); see also *U.S. Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). It has come to the court's attention that "interest" is not a matter without controversy and it cannot be resolved as a simple clerical matter. Since the briefing of this issue, however, notice of appeal has been filed and the court lacks jurisdiction to alter the judgment.

Because the issue has been fully briefed under the captioned case by the attorneys involved in the numerous cases stayed hereunder, because the issue is relevant to the lifting of stays as to such cases, and for administrative convenience, the court will address this matter under this caption. At the outset, the court notes that in the absence of express congressional consent, the United States is immune from an interest award. *Library of Congress v. Shaw*, 478 U.S. 310, 314, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986). Interest is, however, available to claimants when Congress permits such interest to be awarded by statute. Id. at 316.

Plaintiff and amici contend that interest on plaintiff's payments of the Harbor Maintenance Tax ("HMT") is expressly provided for by 28 U.S.C. § 2411 (1988). That statute provides, in relevant part:

> In any judgment of any court rendered (whether against the United States, ...) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment, from the date of the payment

> or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, ...

The Supreme Court has recognized that section 2411 constitutes an express waiver of sovereign immunity with respect to interest and expressly authorizes prejudgment and postjudgment interest payable by the United States in tax-refund cases. *Sahw*, 478 U.S. at 218 n.6. Furthermore, section 2411 applies when taxes are improperly and illegally collected. *Sterns v. Clauson*, 122 F. Supp. 795, 797 (D. Me. 1954).

This court has held that the HMT on exports constitutes a tax prohibited by the Export Clause of the Constitution. *U.S. Shoe Corp.*, 907 F. Supp. at 418. The HMT is a tax provided for by the Internal Revenue Code. See 26 U.S.C. §§ 4461-62 (1994).

Congress, however, has expressly provided in the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461-62, that the HMT is to be treated as a customs duty for the purposes of administration and enforcement as well as jurisdiction. See *id.* § 4462(f)(1)-(2). Additionally, section 4462(f) (3), Title 26, United States Code, provides, in relevant part, that "the tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle for any other provision of law relating to the administration and enforcement of internal revenue taxes." *Id.* § 4462(f)(3) (emphasis added).

The court finds, however, that any monetary relief granted by the court would not constitute either "administration" or "enforcement" of the HMT as envisioned by 26 U.S.C. § 4462(f)(3). That section is limited to matters of routine administration and enforcement by an agency. The legislative history of the HMT statute explains that the underlying purpose of both section 4462(f)(1) and (3) was to confirm which agency was to

have responsibility for collecting and processing HMT payments. See S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714-15 (stating Customs' strong presence at ports of entry and experience at appraising imported merchandise made it appropriate for Customs, rather than Internal Revenue Service to collect, administer, and enforce HMT). The court also notes that while Congress expressly sought to preclude application of the administrative provisions of the Internal Revenue Code in the collection and processing of the HMT, section 2411 is within Title 28 of the United States Code, which governs the judiciary and judicial procedure, rather than an administrative provision within Title 26 (the Internal Revenue Code).

Furthermore, a money judgment for customs duties protested by ordinary administrative and judicial procedures would include interest calculated in a manner similar to that provided for in 28 U.S.C. § 2411. See 19 U.S.C. § 1520(d) (1988); 19 U.S.C. § 1505(c) (1994); 28 U.S.C. § 2644 (1988). Defendant correctly maintains that these statutory provisions, however, do not apply to payments of the HMT where no decision by Customs has been made or no liquidation has occurred. Defendant further maintains that as section 2411 requires the Commissioner of Internal Revenue to take an active role in tendering and setting the date of payment, Congress could not have intended section 2411 to apply to payments of the HMT. The court notes that the issue of how payments of any type are to be made is one of administration. Under the statutory scheme, Customs, not the Commissioner, is required to collect payments of the HMT. The court finds that requiring the Commissioner, rather than Customs, to tender and set the date of payment under a strict literal reading of section 2411 or obviating the requirement of interest because Customs administers the statute but did not provide a decision or liquidation, would be illogical and contrary to legislative intent. See *Witco Chem. Corp. v. United States*, 742 F.2d 615, 619 (Fed. Cir. 1984) ("An absurd construction of a statutory provision should be

avoided."); see also *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1983) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

Reading the applicable statutes in pari materia and finding defendant's interpretation of 28 U.S.C. § 2411 and 26 U.S.C. § 4462 as read together unreasonable, the court must construe the statutes, keeping in mind that "all statutes must be construed in light of their purpose." *Wassenaar v. Office of Personnel Mgmt.*, 21 F.3d 1090, 1096 (Fed. Cir. 1994) (quoting *Best Power Technology Sales Corp. v. Austin*, 984 F.2d 1172, 1175 (Fed. Cir. 1993)); see also *Marlowe v. Bottarelli*, 938 F.2d 807, 813 (1991) (stating rule that "whenever possible courts construe statutes and regulations in pari materia"). The court finds that in actions brought pursuant to 28 U.S.C. § 1581(i) (1988 & Supp. V 1993), Congress intended to provide interest on payments of the HMT for exports pursuant to section 2411, but that related administrative actions would be performed by Customs.

Jane A. Restani

JUDGE

Dated: New York, New York, This 7th day of February, 1996.

UNITED STATES SHOE CORP.,

Plaintiff,

v.

UNITED STATES,

Defendant

Court No. 94-11-00668

UNITED STATES COURT OF INTERNATIONAL TRADE

19 C.I.T. 1284; 907 F. Supp. 408; 1995 Ct. Intl. Trade LEXIS 220; SLIP OP. 95-173

October 25, 1995, Decided

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Corporation, International Business Machines Corporation, Minnesota Mining & Manufacturing Corporation and Seagate Technology Corporation, amici curiae.

Barnes, Richardson & Colburn (Robert E. Burke, Christopher E. Pey, Mark T. Wasden and Cindy H. Chan) for Polaroid Corporation and Amoco Chemical Company, amici curiae.

Coudert Brothers (Steven H. Becker, Charles H. Critchlow and Claire R. Kelly) for Texaco Refining and Marketing Inc., American Natural Soda Ash Corp., United Export Corp., ABRO Industries, GSI Exim America, Inc., Vitol S.A., Inc., M-C International D/B/A McLane Group International L.P., Bridgestone/Firestone Inc., Dorland Management, Inc., FAI Trading Co., Star Enterprises, Inc., Vista Chemical Co., Champion International Corp., Champion Export Corp. and ISP Technologies, Inc., amici curiae.

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mens Solar Industries and Unisys Corporation, amici curiae.

JUDGES:

DiCarlo, Chief Judge, Restani, Judge, Musgrave, Judge.

OPINION BY:

DOMINICK L. DiCARLO

OPINION:

OPINION

DiCARLO, CHIEF JUDGE: Article I, Section 9, Clause 5 of the United States Constitution (the "Export Clause") provides "no Tax or Duty shall be laid on Articles exported from any State." The question presented is whether the Harbor Maintenance Tax, 26 U.S.C. §§ 4461-62 (1988 & Supp. V 1993) (Internal Revenue Code) [hereinafter "Tax"], when imposed upon merchandise exported from the United States, violates this prohibition. The court concludes that it does.

I

This case comes before the court on cross-motions for summary judgment pursuant to USCIT Rule 56. The parties agree there are no material facts in dispute. They also agree that the court has subject-matter jurisdiction to determine the constitutionality of the Tax.

Congress has given the Court of International Trade jurisdiction over matters arising out of the Tax: "For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). This language directs that taxes imposed

upon both imports and exports shall be treated as if they were customs duties, in other words, as import transactions.

Congress's purpose in centralizing jurisdiction over import transactions in the Court of International Trade was to dispel the jurisdictional confusion existing as to the Court of International Trade's predecessor, the Customs Court, and to reflect the true scope of the court's jurisdiction. See H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758-59. As the legislative history of the Customs Courts Act of 1980 shows, Congress sought, by permitting a single court to hear these suits, "to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction." H.R. Rep. No. 1235, at 47, 1980 U.S.C.C.A.N. at 3759. Accordingly, Congress granted the court exclusive jurisdiction over any civil action against the United States arising out of federal laws governing import transactions, because of the court's "already developed expertise in international trade and tariff matters." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1586 (1994). This authority includes the inherent responsibility to review challenges to the constitutionality of a law within that area of expertise. See 28 U.S.C. §§ 251, 1331, 1585 (1988) (providing this court with all powers of U.S. district courts including original jurisdiction over actions arising under Constitution); see, e.g., 28 U.S.C. § 255(a)(1) (1988) (permitting designation of three-judge CIT panels to hear and determine constitutional issues). In addition to the statutory language, the legislative history of the Tax supports this court's jurisdiction. S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6715.

Finally, this is not the first case where the court has taken jurisdiction over matters arising from the Tax; the court recently exercised jurisdiction over claims for restitution of taxes paid by passenger liners pursuant to the Tax in *Carnival Cruise Lines, Inc. v. United States*, 18 C.I.T. 1020, 866 F. Supp. 1437

(1994). In sum, in light of the Tax's plain language, its legislative history and the Court of International Trade's traditional role as the proper forum for review of actions governing import transactions, the court possesses jurisdiction to hear and determine the constitutionality of the Tax.

II

Congress established the Tax as part of the Water Resources Development Act of 1986, Pub. L. No. 96-622, 100 Stat. 4082 (codified as amended in scattered titles of U.S.C.) [hereinafter the "Act"]. While it named the charge imposed upon port users a "tax," 26 U.S.C. ch. 36, subch. A, this nomenclature is not necessarily binding on the court, see *Fairbank v. United States*, 181 U.S. 283, 304, 45 L. Ed. 862, 21 S. Ct. 648 (1901) ("we must regard things rather than names"). The provisions of the Act, including the Tax, are severable. Water Resources Development Act § 949, 33 U.S.C. § 2304 (1988).

The Tax imposes an ad valorem tax on "any port use" of federally-maintained navigable waterways. 26 U.S.C. §§ 4461, 4462(a)(2). The statute defines "port use" as "the loading [and] unloading of commercial cargo [on or] from [] a commercial vessel at a port," 26 U.S.C. § 4462(a)(1), and "port" as any channel or harbor open to public navigation that is not an inland waterway, 26 U.S.C. § 4462(a)(2)(A). The Tax is applied against imports and exports, and domestic shipments, as well as passengers. 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A). Presently, the amount of the Tax imposed is 0.125 percent of the value of the commercial cargo involved. 26 U.S.C. § 4461(b) (Supp. V 1993). This is without regard to the size of the vessel, the manner or extent of use of port facilities, or the condition of the particular port. For passengers, the statute calculates value based on the actual charge paid for the transportation. See 26 U.S.C. § 4462 (a)(5)(B). Further, Congress does not distinguish among port users or particular ports in expending funds for harbor maintenance or operations, even though

some ports or users may contribute the majority of the fees paid.

The Tax exempts certain cargo and passengers from its burden. These exemptions include fish or other aquatic animals not previously landed on shore, ferry passengers, bunker fuel, ships' stores, or equipment necessary for operation of a vessel, bonded commercial cargo entering the United States for transhipment to a foreign country, and any cargo shipped between the continental United States and Alaska, Hawaii or any U.S. possession for ultimate consumption at its destination with the exception of crude oil transported from Alaska. 26 U.S.C. § 4462. The Tax also exempts intraport movement of cargo, recreational and de minimis port use, port use by the U.S. government, and humanitarian and development assistance cargo. *Id.* Congress's stated purpose in enacting the Tax was to have commercial shippers fund the maintenance of U.S. harbors and ports. See S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709; S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644.

In enacting the Tax, Congress concurrently established the Harbor Maintenance Trust Fund, 26 U.S.C. § 9505 (1988 & Supp. V 1993) [hereinafter "Trust Fund"], to carry out the purposes of the Act. Monies collected pursuant to the Tax are transferred to the Trust Fund for disbursal upon further appropriation by Congress in accordance with the Trust Fund's provisions. 26 U.S.C. § 9505(b), (c). Since 1991, Congress has authorized appropriations from the Trust Fund to offset up to 100 percent of the eligible operation and maintenance outlays for harbors under the Act. Water Resources Development Act of 1990 § 316, 33 U.S.C. § 2238 (Supp. V 1993). Congress did not limit expenditure of Tax revenues to the U.S. Army Corps of Engineers, the largest beneficiary of the Trust Fund. Rather, the Departments of the Treasury and Commerce, and the National Oceanic and Atmospheric Administration are also potential recipients of Tax revenues. 26 U.S.C. § 9505(c); see Office of Management and Budget, Executive Office of the President,

FY 1996: Budget of the U.S. Government, Appendix, 376, 802 (1995).

Despite the number of agencies eligible to receive funds, the Trust Fund has been running a yearly surplus since its inception. This surplus burgeoned with the increase in the Tax from 0.04% to 0.125%, (Br. of Amicus Amoco Chem. Co., Ex. A (Second Annual Report to the Congress on the Status of the Harbor Maintenance Trust Fund For Fiscal Year 1993 5 (1994))) [hereinafter "Second Annual Rep."], and is "on budget." The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit. See H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985) ("the increase in net budget receipts [provided by the Tax] will reduce the potential Federal budget deficit by a like amount by providing a new source of user-related revenues rather than relying completely on general fund appropriations"). As of 1994, the government had collected over 500 million dollars from exports alone. (See Br. of Amicus Polaroid Corp., Ex. A (First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund Fiscal Years 1987-1992 4 (1993))) [hereinfater "First Annual Rep."]; Second Annual Rep. at 3.

Plaintiff paid the Tax on articles exported for the period April 1 through June 30, 1994. It now sues for recovery of those monies, claiming imposition of the Tax violates the Export Clause.

III

An act of Congress is presumed to be constitutional. *Fairbank*, 181 U.S. at 285. Any excess in the exercise of legislative power or conflict with the restrictions imposed by the fundamental law should be clear before the court overturns an enactment of the legislature. *Id.* Yet, as Chief Justice Marshall expounded in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.

Ed. 60 (1803), "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Id.* at 180.

A.

Defendant contends that the Tax is a valid exercise of Congress's constitutional authority to regulate foreign and interstate commerce, and does not implicate its taxing powers. According to defendant, although the Export Clause restrains those powers, the Clause cannot circumscribe Congress's unlimited capacity to regulate commerce.

The court concludes the power to regulate commerce does not eclipse the Export Clause. Although Congress can adopt the methods it deems necessary to accomplish its goals pursuant to the regulation of commerce, this authority is limited by other provisions of the Constitution. *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624, 1627 (1995) (providing that commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L. Ed. 23 (1824)); *North Am. Co. v. S.E.C.*, 327 U.S. 686, 704-05, 90 L. Ed. 945, 66 S. Ct. 785 (1946) (noting Congress's commerce powers are limited by express provisions in other parts of Constitution); *Rodgers v. United States*, 138 F.2d 992, 994-95 (6th Cir. 1943). Accordingly, even if the court were to find the Tax to be a charge imposed under the commerce power, such a charge is still subject to the restrictions of the Export Clause if it in fact serves as a tax or duty. For example, a charge upon exports imposed under the Commerce Clause as a user fee, or to regulate commerce, would not be immune from the restrictions of the Export Clause if the court found the charge actually to be a tax or duty on exports. The court looks to substance over nomenclature.

The origin of the Export Clause indicates it is to have broad effect. Two amendments seeking to limit it were rejected. The first would have limited the Clause by adding "for the purpose of revenue" to the prohibition against taxes or duties on exports. II The Records of the Federal Convention of 1787 363 (Max Farrand ed., 1937). The second amendment would have permitted export taxes if approved by a two-thirds majority in both Houses of Congress. Note, *Constitutionality of Export Controls*, 76 Yale L.J. 200, 203 (1966). The Constitutional Convention deliberately chose to leave exports unburdened; and, in so doing, persuaded the South to join the new union. See *id.* at 204. For the Southern States, the Export Clause addressed concerns that a Congress controlled by the North would impose burdensome levies on southern exports. *International Business Machs. Corp. v. United States*, 59 F.3d 1234, 1236 (1995) [hereinafter "*IBM*"].

The Export Clause serves to keep all exportation free of any tax burden. *Fairbank*, 181 U.S. at 290. As the Court in *Fairbank* explained, "if all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." *Id.* at 293.

B.

The court finds the Harbor Maintenance Tax as it applies to exports constitutes a tax prohibited by the Export Clause and does not fall under Congress's Commerce Clause powers. Defendant contends the Water Resources Development Act does not establish a tax upon exports in violation of the Export Clause, because enhancement of the general revenue is not its primary purpose, but is merely one aspect of a comprehensive legislative program providing for conservation and development of the nation's water resources infrastructure. According to defendant, the value of the benefit provided by the program, maintenance of safe and efficient ports and harbors, reasonably relates to the charges imposed and accrues, at least in part, to an

identifiable private beneficiary. In considering the Act as a whole, defendant contends Congress simply imposed a user fee "for the purpose of making effective the congressional enactment." (Def.'s Mem. in Opp'n to Amici at 54) (quoting *Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967)).

For defendant to succeed on this argument, the court must find that regulation is the primary purpose of the Tax, see *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983), cert. denied, 465 U.S. 1080, 79 L. Ed. 2d 764, 104 S. Ct. 1444 (1984), or alternatively, that Congress sought to raise money to recoup the costs of services provided to the payer pursuant to a regulatory scheme, see *Pace v. Burgess*, 92 U.S. 372, 375-76, 23 L. Ed. 657 (1876). The Tax serves neither purpose.

First, the Act neither discourages nor regulates use of a harbor; neither does it so intend. In Moon, the court upheld an export certificate program for wheat farmers. 379 F.2d at 391-93. It found the program's monetary imposition for overproduction, essentially a penalty for non-compliance with the Secretary of Agriculture's production controls, did not violate the Export Clause. *Id.* The court held where regulation is the primary purpose of the statute as a whole and revenue also is obtained incidentally through imposition of sanctions, the Constitution will not necessarily prohibit the charge. *Id.* at 391 (quoting *Rodgers*, 138 F.2d at 994). Here, the Act does not have regulation as its primary purpose. For example, it does not seek to control the amount or manner of port use. Further, the Act does not seek to influence commercial practices, or seek to enforce compliance with a legislative goal as did the Agricultural Adjustment Act of 1938, as amended by the Food and Agriculture Act of 1964, considered in *Moon,* or the Agricultural Act of 1949, as amended, considered in *Block.* Congress instead sought funding for the extensive maintenance projects envisioned under the Act. S. Rep. No. 126 at 7, 1986 U.S.C.C.A.N. at 6644 (noting Congress intended Harbor Maintenance Tax as

new tax to cover portion of Federal spending on harbor maintenance).

Second, there is little indication that Congress intended to establish a user fee. Rather, Congress found an alternative way to fund expenditures it intended to make. When Congress enacted the Tax, it intended to use the Tax to pay the costs of developing, operating, and maintaining port projects. H.R. Rep. No. 251, at 19; S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709. The Act permitted disbursement of Tax proceeds to the U.S. Army Corps of Engineers for recovery of up to 40 percent of its eligible operation and maintenance outlays. Water Resources Development Act of 1986 § 210(a)(2), 33 U.S.C. § 2238(a)(2) (1988); see First Annual Rep. at 1 (noting "federal expenditures for [port and harbor maintenance] were determined to be synonymous with expenditures made by the Army Corps of Engineers"). The Water Resources Development Act of 1990 increased the rate of the Tax and allowed the Corps of Engineers to recover up to 100 percent of its "eligible operations and maintenance costs." 33 U.S.C. § 2238(a)(2) (Supp. V 1993). Since its inception, the Trust Fund has accumulated significant surpluses. See 141 Cong. Rec. E519 (daily ed. Mar. 6, 1995) (statement of Rep. McDermott). Accordingly, we take note of the warning in *Moon*, "certainly if the record in any way indicated that substantial amounts of revenue had been generated by the sale of export certificates, we would hesitate before deeming the program an exercise of the commerce power." 379 F.2d at 392.

The court finds the primary purpose of the Tax is to raise revenue, as Congress has imposed "a duty under the pretext of fixing a fee," *Pace*, 92 U.S. at 376. For a charge to withstand constitutional challenge under the Export Clause, it must defray costs of services rendered pursuant to the regulation of commerce, and the taxes collected may not be excessive. In the *Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 595-96, 28 L. Ed. 798, 5 S. Ct. 247 (1884), the Supreme Court upheld a per capita charge on non-U.S. citizens arriving in the United

States by ship. The Court found the statute in question imposed the fee to defray costs appropriated in advance for inspection of immigrants before landing, and for their care and provision afterward. *Id.* at 590. The Secretary of the Treasury was to "distribute the fund in accordance with the purpose for which it was raised, not exceeding in any port the sum received from it." *Id.* As such, the charges imposed were incidental to the regulation of commerce and directly reimbursed the costs of services rendered to the individual.

Similarly, in *Pace*, the Supreme Court concluded that a fee for stamps used to distinguish tobacco intended for export - and thus to alleviate it from the heavy exactions placed upon tobacco sold domestically - was not a tax on exports. See 92 U.S. at 375-76; see also *Turpin v. Burgess*, 117 U.S. 504, 29 L. Ed. 988, 6 S. Ct. 835 (1886) (sustaining, on similar grounds, constitutionality of charge imposed to identify tobacco packages intended for export). Rather, the Court characterized the stamp as a fee "accruing in the due administration of the laws and regulations," serving simply as "compensation given for services properly rendered." *Pace*, 92 U.S. at 375. The Court found the payment for the services rendered, through identification of tobacco exported, was no different than "the fee for clearing the vessel in which [the tobacco] was transported, or for making out and certifying the manifest of the cargo." *Id.* The amount of the fee never exceeded the costs to produce the stamps and the cost of services necessary to give the exporter the benefit of the exemption from taxation; identification of the tobacco provided the exporter the direct benefit of a domestic tax exemption.

In contrast, little nexus binds the imposition of the ad valorem tax on cargo to the costs of port maintenance and regulation of shipping. As the exaction is tied to value and there is no mechanism to ensure that the fees collected will be used "only or primarily for the cost of" port maintenance associated with the shipping that is taxed, the Tax is not a user fee imposed under the commerce power. The fees collected, rather, yield funds for the purpose of maintaining and developing American ports and harbors for all uses,

American ports and harbors for all uses, commercial and recreational. Further, the Tax funds projects yet to be commenced, or even envisioned, rather than services already rendered. Application of the Tax has produced a substantial surplus in excess of the costs incurred. The court therefore finds the Tax raises revenue, and is not a user fee imposed pursuant to the regulation of commerce.

The Supreme Court recently has used another test to distinguish between an impermissible tax and a user fee. In *Massachusetts v. United States*, 435 U.S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978), the Court considered whether an aircraft registration fee levied on state police aircraft violated the judicially-implied intergovernmental tax immunity doctrine first set forth in *Collector v. Day*, 78 U.S. (11 Wall.) 113, 20 L. Ed. 122 (1871). In concluding that it did not, the Court relied on three criteria derived from *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972). To constitute a user fee, as contrasted with a tax, the Court held: (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *Massachusetts*, 435 U.S. at 466-70.

The Tax fails classification as a user fee under the test presented in *Massachusetts*. Although the Export Clause clearly is designed "to protect constitutionally valued activity from undue burden" that could result from certain taxing measures, see *id.* at 462, the court need not decide the issue of whether the tax is discriminatory. Even assuming, arguendo, that the Tax is non-discriminatory, the court finds the Tax fails the remaining two prongs of the *Massachusetts* test.

First, the charge is not based upon some fair approximation of the cost of the benefits port users receive from harbor main-

tenance and development projects. Low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters. Yet, the cost to the latter is greater than that to the former. Further, most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures. (See, e.g., Br. of Amicus Amoco Chem. Co., Ex. G (Army Corps of Engineers, Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports (1992)) (draft document) (noting of $78,711,000 estimated collected 1992 taxes on exports and imports from Port of Los Angeles, only expenditures). $162,000 returned in port operation and maintenance expenditures). Additionally, although only certain commercial users must pay the tax, they are not the sole users of the ports nor the only beneficiaries of the maintenance and development projects. Based on the foregoing, the court does not find the charge imposed under the Tax is based on a fair approximation of the costs of benefits received by port users.

Second, the charge is excessive in relation to the cost to the government. The Tax is used to fund projects yet to be commenced, or even envisioned, rather than to repay the government for services rendered. The Tax has produced a substantial surplus, that is rapidly expanding, in excess of costs incurred. Second Annual Rep. at 5.

In sum, the Tax neither seeks to regulate Commerce nor repay the costs of services rendered; moreover, the Tax fails the alternative test provided by *Massachusetts*. Accordingly, the Tax is subject to the prohibitions of the Export Clause.

C.

Defendant questions whether the Harbor Maintenance Tax is a tax levied upon "exported articles" within the meaning of the Export Clause. According to defendant, a tax or fee only violates the Export Clause if it is levied on goods by reason of their exportation, e.g., if such goods have entered the export stream. Defendant contends the broad prohibition of the earlier

cases against a tax upon goods having entered the export stream was curtailed by *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535 (1976), and further constrained in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978).

Further, according to defendant, imposition of the Tax upon loading of freight is merely intended to ensure that those who actually use the ports would pay. As such, the time when the Tax attaches has no other significance for purposes of assessment of the fee upon exports. The motivation behind imposing an ad valorem charge, defendant insists, was to minimize possible competitive disadvantages among cargo types and U.S. ports that would have arisen from a user charge.

In any case, defendant argues the *Michelin* and *Washington Stevedoring* tests now examine the nature of the tax at issue, rather than the status of the article. Those cases explored whether the taxes were upon "exports as such" and whether they offended the policies protected by the framers of the Constitution. Those policies, defendant argues, include promoting uniformity among the former colonies and preventing the North from crippling the export-dependent Southern States pursuant to the Import-Export Clause. U.S. Const. art. I, § 10, cl. 2 ("No States shall ... lay any Imposts or Duties on Imports or Exports ...."). Specifically, defendant contends *Michelin* established that a nondiscriminatory ad valorem property tax did not violate the Import-Export Clause simply because it applied to recently imported goods - there, tires maintained at a wholesale distribution warehouse. 423 U.S. at 286. Similarly, defendant contends *Washington Stevedoring* held that a nondiscriminatory local tax that compensates the state for services rendered also failed to implicate the concerns of the Import-Export Clause. 435 U.S. at 755.

Integral to these tests, defendant contends, is the court's examination of whether the charge discriminates in imposing its

burden. According to defendant, a nondiscriminatory charge for a service that facilitates export activity does not violate the Export Clause. Defendant maintains the Tax is such a charge. The court disagrees.

In examining whether the Tax burdens "exported articles," the court limits its inquiry to the Export Clause, for there is a distinct difference in language between the Import-Export Clause and the Export Clause. See *IBM*, 59 F.3d at 1238-39. The decisions in *Michelin* and *Washington Stevedoring* attached significance to the distinction between "Imposts and Duties," and the Export Clause's broader prohibition. See *Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759- 60. As the Supreme Court in *Michelin* noted, the Import-Export Clause only bans "Imposts or Duties" and is not "a broad prohibition of every 'tax.'" 423 U.S. at 290. According to the Federal Circuit, a difference in policy intended by the framers of the Constitution underlies the difference in language:

> While the Import-Export Clause was intended to prohibit States from imposing a 'transit fee' on goods moving in foreign commerce, the Export Clause served the broader purpose of 'forbidding federal taxation of exports.' The Supreme Court's current narrower view of the prohibition in the Import-Export Clause thus does not dictate that the Export Clause be given a similarly narrow construction.

IBM, 59 F.3d at 1239 (citations omitted). Defendant's citations of *Michelin* and *Washington Stevedoring* are, thus, inapplicable.

Moreover, even if this court were to assume *Michelin* and *Washington Stevedoring* apply to the Export Clause, the cases remain distinguishable. *Michelin* concerned imported tires that had already lost their identity as a unit and as an import after being unloaded and stored within a warehouse. See 423 U.S. at 280. At the warehouse, workers unloaded the containers in which the tires were shipped, sorted the tires by size and style, and stacked them on wooden pallets, without segregation by

place of manufacture. *Id.* The tires required no further processing to ready them for sale and delivery to franchised dealers. *Id.* In this sense, the Court found the warehouse operated "no differently than ... a distribution warehouse utilized by a wholesaler dealing solely in domestic goods." *Id.* at 302. Accordingly, the holding in *Michelin* turned on the fact that the goods were no longer in import transit. *Id.* at 286.

As distinguished from the unloaded and unpacked imports in *Michelin*, the cargo taxed in this case has entered the stream of exports. The cargo, as it is loaded on board the vessel, is in transit, and the Tax falls upon the merchandise itself. As such, it is an article protected by the Export Clause. *Michelin* is inapplicable.

In *Washington Stevedoring*, the Supreme Court upheld a business and occupation tax imposed by the State of Washington upon the value of certain services rendered - the loading and unloading of cargo. *Id.* at 737, 758. The Court distinguished the stevedoring services from maritime insurance policies covering such goods. *Id.* at 756 n. 21. The Court found placing a tax upon the insurance policies was more suspect, and likely unconstitutional as a violation of the Import-Export Clause, because "the value of goods [bore] a much closer relation to the value of insurance policies on [those goods] than to the value of loading and unloading ships." *Id.* As the amount of the Tax ad valorem is tied directly to the value of the goods, *Washington Stevedoring* is equally inapplicable.

Two distinct tests have evolved from case law for determining whether the Export Clause will immunize an article from taxation. First, the court must examine the immediacy of exportation. Second, the court considers the proximity of the tax imposed to the value of the articles exported. Here, neither test supports the constitutionality of the Tax.

In delineating a zone where an article in the stream of commerce melds into the export stream, the court looks to see whether the article is in the actual process of exportation, and

whether it "has begun its voyage or its preparation for the voyage." *Cornell v. Coyne*, 192 U.S. 418, 428, 48 L. Ed. 504, 24 S. Ct. 383 (1904). For instance, where exported articles were delivered to the carrier and title passed, the Supreme Court found those articles had entered the process of exportation. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 68-70, 67 L. Ed. 865, 43 S. Ct. 485 (1923). Thus, taxing such articles would have been unconstitutional. Although other actions may have been necessary before the goods would have been in transit, "so long as [these actions] were only the regular steps" taken to export such goods, the effect of the sale was to start the goods upon their voyage abroad. See *id.* at 69-70.

Constitutional freedom from the taxation of exports involves more than mere exemption from taxes laid directly upon the articles exported. In *Fairbank*, the Court held that a stamp tax imposed on a foreign bill of lading was equivalent to a tax upon the articles listed, and therefore contrary to the *Export Clause*. 181 U.S. at 312. The Court noted exports almost always require bills of lading. See *id.* at 294 (citing *Almy v. California*, 65 U.S. (24 How.) 169, 174, 16 L. Ed. 644 (1861) (noting necessities of foreign commerce always require association with bill of lading, the Court reasoned, Congress had violated the letter and spirit of the Export Clause.) See *id.* at 290-291, 300, 312.

Similarly, in *Thames & Mersey Marine Insurance Co. v. United States*, 237 U.S. 19, 59 L. Ed. 821, 35 S. Ct. 496 (1915), the Supreme Court found a tax upon policies of marine insurance on exports prohibited by the Constitution. In reaching its determination, the Court inquired whether the tax imposed was so directly and closely related to the process of exportation that the tax was in substance a tax upon the exports themselves. *Id.* at 25. The Court found its answer within the dynamics of trade and commerce: where commerce requires an item for exportation - such as a written instrument necessarily and always associated with the export of articles of commerce - taxation of that item serves as taxation of the exported article. *Id.* at 26-27.

This prohibition of the Export Clause also has been applied to taxes upon charter parties, contracts for the carriage of full cargo lots, *United States v. Hvoslef*, 237 U.S. 1, 16-17, 59 L. Ed. 813, 35 S. Ct. 459 (1915) and, more recently, to excise taxes on premiums paid to foreign insurers, *IBM*, 13 Fed. Cir. (T), 59 F.3d 1234.

Here, Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, see *A.G. Spalding*, 262 U.S. at 68-70, a tax imposed on the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.

The Tax is assessed ad valorem directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an ad valorem tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

Accordingly, the court concludes the Tax is prohibited by the Export Clause and it need not address amici's (claimants in other cases) contentions pertaining to whether the Tax also violates the Due Process Clause or the Port Preference Clause of the Constitution.

IV

As indicated, the parties agree that this court has subject matter jurisdiction, see supra p. 3, but disagree as to the specific basis upon which exporters may make claims. Two subsections of the court's jurisdictional statute may provide the parties a route for judicial review. See 28 U.S.C. § 1581(a), (i) (1988 & Supp. V 1993). Subsection 1581(a) provides for review of a denial by the Customs Service of a protest of certain duties, charges, exactions, or drawbacks. 28 U.S.C. § 1581(a); 19

U.S.C. § 1515 (1988 & Supp. V 1993). A party must protest a Customs decision within 90 days of the date of the decision to be protested. 19 U.S.C. § 1514(c)(3)(B) (Supp. V 1993). On the other hand, subsection 1581(i) gives the court broad residual authority over civil actions arising out of federal statutes governing import transactions. Conoco, 12 Fed. Cir., 18 F.3d at 1586. Subsection 2636(i) of the same title requires a party to commence an action under subsection 1581(i) "within two years after the cause of action first accrues." 28 U.S.C. § 2636(i) (Supp. V 1993). The court's decision as to the appropriate jurisdictional basis relates to the amount of plaintiff's recovery.

A.

Defendant argues jurisdiction is only proper under subsection 1581(a). According to defendant, the court may review challenges to the constitutionality of the Tax only where an exporter properly protests its payment, and seeks review of the denial of that protest. Although defendant concedes that "neither jurisdictional provision may fit exactly," (Tr. of Oral Argument at 24 (June 27, 1995)) [hereinafter "Tr."], defendant contends permitting this case to rest upon any other jurisdictional ground would greatly expand the government's liability and would disregard the only congressionally-mandated avenue to challenge the Tax.

According to defendant, Congress intended this Court to entertain a tax challenge only after an exporter had protested its payment of the tax. Defendant garners support for this interpretation from the statutory language directing the court to treat the tax as a customs duty for the purpose of jurisdiction. If the court properly is to treat the tax as a customs duty, defendant contends, the protest procedures under subsection 1581(a) must govern.

Further, defendant argues, there is a Customs decision for the parties to protest - Customs' decision to accept payment. (Tr. at 25.) Defendant contends administration of the Tax is not

merely ministerial, because subsection 4462(i), title 26, United States Code authorizes Customs, through the Department of the Treasury, with administering the assessment of the Tax. Defendant claims Congress has delegated substantial authority to the Secretary of the Treasury (1) to determine the method of payment and collection of the Tax; (2) to exempt certain transactions from the Tax where collection would be impracticable; and (3) to provide for mitigation of penalties and the settlement of claims. Defendant claims this grant of power gives the Secretary of the Treasury "near plenary authority to 'carry out the purposes' of the Act. "(Def.'s Mem. in Opp'n to Amici at 34.) Accordingly, defendant contends, Customs' power to administer the Tax transcends a ministerial role.

Defendant cites a number of authorities in support of its position. In *Norfolk & Western Railway Co. v. United States*, 18 C.I.T. 55, 843 F. Supp. 728 (1994), defendant asserts the court found the assessment of a user fee similar to the Tax constituted a protestable decision, and the period for filing the protest began when Customs decided the plaintiff would have had to pay the fee. In *General Motors Corp. v. United States*, 10 C.I.T. 569, 643 F. Supp. 1139 (1986), defendant contends the court held administrative procedures, where available, had to be exhausted even before Customs issued its decision. According to the defendant, although the court found the obligation to pay the charges was derived from statute, payment of the duties was pursuant to section 1514, and therefore protestable. The fact that Customs took no affirmative action to collect the duties but only accepted or rejected certain offers, defendant argues, did not alleviate the need for protest.

These arguments are unpersuasive. Section 1581(a) permits review of protest denials by Customs for only certain final decisions enumerated in 19 U.S.C. § 1514(a). See 28 U.S.C. § 1581(a); 19 U.S.C. § 1515. For a party to be able to protest and obtain jurisdiction pursuant to section 1581(a), Customs first must have made a decision. See 19 U.S.C. § 1514(a), (c) (1988 & Supp. V 1993) (noting Customs decisions are final unless

protested and that such protests must "set forth distinctly and specifically" each decision protested).

Acceptance of payment of duties owed does not constitute a protestable decision. See *Dart Export Corp. v. United States*, 43 C.C.P.A. 64, 74, C.A.D. 610 (holding Customs' acceptance of estimated duties tendered did not constitute decision), cert. denied, 352 U.S. 824, 1 L. Ed. 2d 48, 77 S. Ct. 33 (1956); *Best Foods, Inc. v. United States*, 37 Cust. Ct. 1, 9-10, 147 F. Supp. 749, 756-57 (1956) (holding payment of customs duties at time of entry not decision for purpose of computing time to file protest). Customs plays little role in accepting the payments; rather, they arrive at a "postal rental box serviced by a commercial bank that processes [Harbor Maintenance Fund] payments and deposits them to the United States Treasury." United States General Accounting Office, U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees, GAO/GGD-92-25, at 5 (Dec. 1991). As recognized by this court in *Carnival*, it would be impossible to protest the Tax as "there was no decision of Customs which [plaintiffs] could protest." 866 F. Supp. at 1441.

Neither the Harbor Maintenance Tax statute, nor its regulations, require a decision from Customs. As previously noted, the statute imposes a Tax on commercial cargo at loading for exports and unloading for imports. 26 U.S.C. § 4461(c)(2). Liability is an ad valorem percentage of the cargo value. 26 U.S.C. § 4461(b) (Supp. V 1993). Value is determined by standard commercial documentation. 26 U.S.C. § 4462(a)(5)(A). Thus Congress, and not Customs, has set the time of imposition and the amount of the Tax. The regulations require exporters to pay port "use fees" on a quarterly basis and mail their payment with a quarterly summary report or cover letter identifying the exporter to Customs' post office box in Chicago. 19 C.F.R. § 24.24(e) (1995). Exporters may request refunds by mailing an amended quarterly summary report with a copy of the quarterly summary report for the quarter(s) in which they request a refund to the Chicago post office box, *id.*, or alternatively by fil-

ing with Customs Headquarters through general provisions for claims not otherwise provided for by the regulations, 19 C.F.R. § 24.73 (1995). None of these procedures requires Customs to judge the constitutionality of the Tax, and cannot be considered decisions with respect to payment. These actions are merely ministerial in nature. Although there may be circumstances where Customs might exercise discretion in administering and enforcing the Tax, this discretion does not extend to a determination on the constitutionality of the Tax.

In this case, there are no issues of classification or similar issues which would be part of a protestable decision. In *Mitsubishi Electronics America, Inc. v. United States*, 12 Fed. Cir., 44 F.3d 973, 976 (1994), the Federal Circuit held Customs does not make protestable decisions concerning antidumping duties under 19 U.S.C. § 1514(a). The Court of Appeals emphasized that Customs only performed a ministerial function in collecting such duties under the direction of the Department of Commerce, and Customs did not conduct an investigation, determine rates and margins, or issue antidumping orders. 44 F.3d at 977. Plaintiff and amici do not argue that they have overpaid the amount of the Tax; rather, their challenge goes to the heart of the constitutionality of the statute itself, a matter outside of Customs' authority. See generally *McCarthy v. Madigan*, 503 U.S. 140, 147-48, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992) (noting agency may be unable to consider whether relief should be granted, because of lack of institutional competence to resolve issues presented). Similarly, in *United States Cane Sugar Refiners' Ass'n v. Block*, 3 C.I.T. 196, 201, 544 F. Supp. 883, 887, aff'd, 69 C.C.P.A. 172, 683 F.2d 399 (1982), in which protest was not required, Customs could not change the scope of the Presidential Proclamation as to over-quota sugar. Much like *Mitsubishi* and *Cane Sugar Refiners'*, there is no decision by Customs as to whether it will assess the Tax.

Customs does not determine the application, policies, or rates of the Tax, but merely serves to implement its provisions. As distinguished from *National Corn Growers Ass'n v. Baker*,

6 Fed. Cir. 70, 840 F.2d 1547 (1988), where the policies and rates in question were those of Customs, and "peculiarly within the ambit of the Customs Service to correct," 6 Fed. Cir. (T) at 82, 840 F.2d at 1556, Customs is powerless to correct the constitutional infirmities raised by plaintiff. See *Califano v. Sanders*, 430 U.S. 99, 109, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977) (finding administrative hearing procedures unsuited to resolving constitutional issues). In short, Customs must simply follow the path enacted by Congress.

Moreover, neither of defendant's proffered cases, *Norfolk* nor *General Motors*, supports its position. The protestable decision in *Norfolk* - an assessment of a user fee - is distinguishable from the present case. In *Norfolk*, the protestable decision was Customs' particular application of a statute. 843 F. Supp. at 733. Customs' decision was limited to whether a vessel constituted a ferry or a barge, not whether the application of the user fee was constitutional.

General Motors is equally inapposite. The issue concerned whether car radio components imported into the United States as original motor-vehicle equipment were diverted for other uses, and therefore subject to penalty. 10 C.I.T. at 570, 643 F. Supp. at 1139-40. Defendant argues the court found "payment [of duties] equated to the protestable event," even though the duty to pay was derived from statute, and not a Customs decision. (Def.'s Br. in Opp'n to Amici at 32.) This argument is misplaced. Plaintiff only paid the diversion duties "once Customs indicated to plaintiff that it considered the merchandise diverted." 10 C.I.T. at 575, 643 F. Supp. at 1143 (emphasis added). Customs made a decision in finding General Motors had diverted the radios. Again, Customs did not consider the constitutionality of the statutory scheme as a whole.

Defendant's own arguments support Customs' inability to make a decision as to the constitutionality of the Tax. Defendant initially argues, "the decision requiring the payment is the law itself, the compulsion to pay is provided by the statute it-

self. The decision is the decision to accept payment from the exporter." (Tr. at 26.) Defendant subsequently qualifies this statement, noting, "it isn't a decision by Customs to accept and retain the money, it has no authority to return it unless the proper procedures have been followed, which are filing of a protest and a denial of a protest." *Id.* at 59. Such reasoning is circular. For plaintiffs to file a valid protest, Customs must have made a protestable decision. As a decision, according to the defendant, can only be made after the protest is filed, no protestable decision exists.

Finally, certain amici contend the denial of a refund request pursuant to 19 C.F.R. § 24.24(e)(5) is a protestable decision, and that subsection 1581(a) would provide the appropriate basis for jurisdiction. Although Customs has discretion to decide whether it is able to refund payments of the Tax, such discretion is limited and does not extend to determinations of constitutionality. As Customs does not have the power to decide the constitutionality of the Tax, the court finds protestable decisions pursuant to the refund provision of subsection 24.24(e)(5) are limited to decisions pertaining to the administration of the Tax, not its constitutionality.

Subsection 1581(i) embraces the issues contested as to the Harbor Maintenance Tax. It provides, in pertinent part,

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for--
>
> (1) revenue from imports or tonnage;

(4) administration and enforcement with respect to the matters referred to in paragraph (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i). Congress directed the Tax be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within subsection 1581(i)(1).

Congress similarly intended the administration and enforcement of the Tax to be treated as the administration and enforcement of a customs duty. 26 U.S.C. § 4462(f)(1). Thus, jurisdiction lies under subsection 1581(i)(4) as it relates to subsection 1581(i)(1).

In sum, jurisdiction is provided by 28 U.S.C. § 1581(i).

V

The court finds the Harbor Maintenance Tax, as it applies to exports unconstitutional. Plaintiff's motion for summary judgment is granted, defendant's cross-motion for summary judgment is denied. Parties are to submit a proposed judgment in conformity with the opinion within 20 days.

DOMINICK L. DiCARLO

Chief Judge

JANE A. RESTANI

Judge

R. KENTON MUSGRAVE

Judge

Dated: October 25th, 1995
New York, New York

CONCUR BY:
MUSGRAVE

CONCUR:

Judge **MUSGRAVE**, concurring.

I concur in the opinion that the Harbor Maintenance Revenue Act (the "Act") is unconstitutional as it applies to exports and that the plaintiff U.S. Shoe is entitled to the remedy it requests, namely a refund of export taxes going back two years from the time it filed its complaint. Nevertheless, I offer some additional comments addressing the jurisdictional issue and the prayers of certain amici for a full refund of all taxes illegally collected from them since the implementation of the Act.[1] In my view, the manifestly inadequate administrative protest procedure under 28 U.S.C. § 1581(a) is a further reason that 28 U.S.C. § 1581(i) jurisdiction arises; moreover, complainants are entitled to a restitution of all taxes heretofore exacted under the Act in violation of the Export Clause of the United States Constitution.[2] This latter position is compelled by the Fifth Amendment Due Process Clause enjoining the deprivation of "life, liberty, or property, without due process of law."

I

As an initial matter, recent opinions of the Court of Appeals for the Federal Circuit and this Court have ruled unambiguously that a decision by the Customs Service ("Customs") is a condition precedent for section 1581(a) jurisdiction to arise.

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[1] E.g., "Amici respectfully join in plaintiff's request that this Court find the HMT unconstitutional, strike it down, and direct pursuant to the power granted it under 28 U.S.C. § 1585 that all HMT payments unlawfully collected be refunded, together with such other and further relief as may be appropriate." (Amici Texaco et al.'s Mem. Supp. Summ. J. at 2) (emphasis added).

[2] The other jurists on this panel are not in accord with the comments addressing the remedy issue.

Mitsubishi Electronics of America, Inc. v. U.S., 44 F.3d 973 (Fed. Cir. 1994); *Carnival Cruise Lines v. U.S.*, 18 C.I.T. 1020, 866 F. Supp. 1437 (1994). As the Court's opinion makes abundantly clear, there is no decision involved in Customs' collection of these unconstitutional taxes because Customs lacks discretion in the performance of its delegated ministerial duties. In addition to this reason, however, there is a further justification for the Court to invoke its section 1581(i) jurisdiction in this case: requiring plaintiffs to pursue a remedy under the protest procedures mandated by section 1581(a) would oblige them to follow a manifestly inadequate and utterly futile procedure.

Certain amici argue that a party could presumably request a refund as set forth in 19 C.F.R. §§ 24.24(e)(5) or 24.73, obtain a denial of refund from Customs, and then protest that decision of Customs to deny the refund by way of the administrative protest process prescribed by 19 U.S.C. §§ 1514 and 1515. According to these amici, the Court could dismiss as not ripe for adjudication those actions which were filed prior to Customs denying a refund request, but instead should waive exhaustion of administrative remedial procedures and assert jurisdiction under section 1581(i), as such procedures are inadequate for the type of relief sought. (Br. of Amici Curiae Aris-Isotoner, et al., at 14-22.) Plaintiff and nearly all amici argue that the available administrative protest remedy set forth in 19 U.S.C. §§ 1514 and 1515 is futile and manifestly inadequate under the circumstances. The ultimate issue presented by such arguments is whether administrative remedies set forth by statute and regulations are appropriate when a party seeks a refund of payments mandated by an act of Congress by challenging such act as unconstitutional.

The administrative remedial procedure as it applies to refund requests is clearly not meaningful or adequate under the given circumstances. See generally *McCarthy v. Madigan*, 503 U.S. 140, 144-149, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992) (explaining circumstances in which administrative remedies need not be exhausted); and *Conoco v. Foreign Trade Zones*

Board, 18 F.3d 1581 (Fed. Cir. 1994) (holding section 1581(a) jurisdiction inappropriate where it is futile or manifestly inadequate). Most importantly, as the Court's opinion makes clear, Customs does not have authority to refund Tax payments or otherwise grant effective relief for constitutional claims. It is well settled that an administrative agency lacks the authority to declare an act of Congress unconstitutional. See *Califano v. Sanders*, 430 U.S. 99, 109, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Hence, under the circumstances of this case Customs is compelled to deny any administrative refund claim, making a request for refund a futile act.

Moreover, Customs has predetermined the issue before it. As plaintiff points out, Customs' denial of protests challenging the constitutionality of the Harbor Maintenance Tax (26 U.S.C. §§ 4461 and 4462, hereinafter the "Tax") is a foregone conclusion. (Pl.'s Mem. Supp. Summ. J. at 15-16.) Customs routinely denies all of the protests it receives in connection with Tax payments. The denial is a form letter simply asserting in one sentence that the levy is not an unconstitutional tax but a statutorily mandated user fee.[3] Such routine denial demonstrates that filing refund requests with Customs on grounds of unconstitutionality is clearly a futile act.

Lastly, requiring a party to file for refunds may unduly prejudice that party. "Prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action." *McCarthy*, 503 U.S. at 147. The administrative refund processes set forth under 19 C.F.R. §§ 24.24(e)(5) and 24.73 do not provide a time frame for the resolution of a claim for refund. This Court has recently deemed it appropriate to waive

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[3] Declaration of Charles Davies, Director - User Fee Task Force, Headquarters Office of Inspection and Control at 6, and attachments.

exhaustion of administrative remedies because they were not clearly delineated and because they set up indefinite timetables. *B-West Imports v. United States*, 19 C.I.T., 880 F. Supp. 853, Slip Op. 95-28 (Feb. 24, 1995). The administrative refund procedures are similarly indefinite and are therefore inadequate under the circumstances of the present case.

Before this Court may exercise jurisdiction over this matter by way of section 1581(i), there must be terms within the language of that section which cover the issues plaintiff brings before the Court. *Conoco*, 18 F.3d at 1588-89. Defendant argues that section 1581(i) by its own terms fails to provide a jurisdictional basis for a constitutional challenge to the Tax because plaintiff's claims are based upon payments associated with exports, while the express terms of subsections 1581(i)(1) and (2) apply only to imports. (Def.'s Mem. Supp. Summ. J. at 24.)

The terms of section 1581(i) make clear that the Court has jurisdiction over any civil action that arises out of any United States law providing for the matters set forth in the statute. Defendant's reading of section 1581(i) would eliminate that all-encompassing term and in effect grant the Court jurisdiction only over the specific matters set forth in subsections 1581(i)(1)-(4), but not the laws dealing with those matters. Such an interpretation would mean that this Court would have jurisdiction over the Tax as it applies to imports, the district courts would have jurisdiction over the Tax as it applies to exports, and it is uncertain as to which court would have jurisdiction over the Tax as it applies to, e.g., passenger services.

As the opinion of the Court points out, Congress did not intend for the district courts to exercise jurisdiction over the Tax. The statutory language of 26 U.S.C. § 4462(f)(2) and its accompanying legislative history indicate Congress' clearly stated intention that this Court have jurisdiction over the Tax. Furthermore, "Section 1581(i) was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions and

to eliminate the confusion over whether jurisdiction lay in the Court of International Trade or the district courts." *Conoco*, 18 F.3d at 1588 (emphasis added). Thus it was the intent of Congress for this Court to exercise jurisdiction over the entire Tax, not just those portions of the Tax that are covered under the specific subsections 1581(i)(1)-(4).

The terms of section 1581(i) embrace the Tax. This Court has found that the Tax is a law which provides for revenues from imports and exports, and for the administration and enforcement with respect to those revenues including the protest process. Therefore, subsections 1581(i)(1) and (4) provide this Court with jurisdiction over the Tax.

In sum, Customs has not made a decision with respect to the Tax upon which a valid or meaningful protest may be predicated. Defendant's arguments simply ignore that necessary prerequisite to the protest process set forth under 19 U.S.C. §§ 1514 and 1515. Moreover, under the circumstances of this case, it is futile and manifestly inadequate to await a decision by Customs with respect to an administrative refund request. As required, the terms of section 1581(i) cover the issues that plaintiff brings before the Court. The Court's jurisdiction is therefore properly asserted over this matter by way of section 1581(i). The Court is authorized by statute to exercise discretion in requiring exhaustion of administrative remedies. 28 U.S.C. § 2637(d). Having found jurisdiction under section 1581(i), pursuant to this Court's discretionary powers under 28 U.S.C. § 2637(d), and for the reasons previously discussed, it is inappropriate to require exhaustion of any administrative remedy when, as in this case, a party requests a refund by challenging the constitutionality of an act under which payment was made.

II.

It is the duty of this Court to exercise judicial review over Congressional acts within its jurisdiction, and "should Congress, in the execution of its powers, adopt measures which are

prohibited by the Constitution ... it would become the painful duty of this tribunal ... to say, that such an act was not the law of the land." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423, 4 L. Ed. 579 (1819). As the opinion of the Court details, there is no question that the Act violates the Export Clause. Insofar as the Act therefore is not the law of the land, it is void ab initio: "an invalid exercise of the power of Congress ... [is] as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity ...." *Chicago, I. & L. R. Co. v. Hackett*, 228 U.S. 559, 566, 57 L. Ed. 966, 33 S. Ct. 581 (1913). When the invalid act is the federal government's unconstitutional exaction of taxes, taxpayers' rights under the Due Process Clause of the Fifth Amendment are implicated. "Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 131 L. Ed. 2d 820, 115 S. Ct. 1745, 1752 (1995) (Scalia, J., concurring).

A tax refund is the only appropriate remedy for the government's illegal collection of revenue under the Act. Because the tax violates the Export Clause, it was "beyond the [government's] power to impose, ... [and the government has] no choice but to undo the unlawful deprivation by refunding the tax previously paid under duress, because allowing the [government] to collect these taxes by coercive means and not incur any obligation to pay them back ... would be in contravention of the [Due Process Clause]." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 39, 110 L. Ed. 2d 17, 110 S. Ct. 2238 *(1990)*. Yet an attempt to collect all moneys illegally exacted since the tax's incipience in 1987 ostensibly conflicts with the two-year statute of limitations applicable generally to claims brought under 28 U.S.C. § 1581(i). Due to the peculiar circumstances of this case, however, enforcing the statute of limita-

tions would impermissibly infringe constitutional rights guaranteed under the Fifth Amendment Due Process Clause.

The United States Supreme Court has held that "[a] constitutional claim can become time-barred just as any other claim can. ... Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 461 U.S. 273, 292, 75 L. Ed. 2d 840, 103 S. Ct. 1811 (1983). While valid claims based upon unconstitutional acts by the federal government may at some time become stale or deemed waived, an attempt, as here, at interposing a very short statute of limitations runs afoul of due process and flaunts the sovereign's role as, among other things, protector of rights of its citizens, from whom this government, almost uniquely when it was created, acquired all of its powers. And here, the legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act; this being true, enforcing the foreshortened statute of limitations is to reward the perpetration of an overtly unconstitutional action.

The Bill of Rights incorporates those indefeasible rights which the citizens decline to surrender to the sovereign, and it is this very feature of our constitutional democracy -- that the government is empowered only to the extent that citizens surrender their rights -- which distinguishes it from other political systems in which people derive their rights only from the state. Although the federal government enjoys broad immunity, this immunity does not extend to unconstitutional behavior, and a statute of limitations that operates in violation of the Due Process Clause constitutes an invalid exercise of the power of Congress which does not immunize the government from suit. [4]

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[4] See Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1427 (1987) ("Whenever a government entity transgresses the limits of its delegation [of powers] by acting ultra vires, it ceases to act in the name of the sovereign, and surrenders any derivative "sovereign" immunity it might otherwise possess.").

The exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation. [5]

Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). "To hold otherwise would be to create the possibility that Congress could act unconstitutionally and then attempt to shield its action from review by virtue of sovereign immunity." *Bartlett v. Bowen*, 259 U.S. App. D.C. 391, 816 F.2d 695, 708 (D.C. Cir. 1987). Thus, it is to no avail that the interlocutor points to the jurisdictional nature of the statute of limitations presently under consideration. Moreover, "The courts ... have recognized a principle that the constitutional guarantee of an independent judiciary limits the legislature in the exercise of its power to regulate court jurisdiction." *Bartlett*, 816 F.2d at 705. The judicial branch must not countenance the disenfranchisement of democratic constitutional rights in deference to the royal cloak of sovereign immunity. To do so would be to abrogate the judiciary's proper role as protector and final arbiter of constitutional rights, a role implicit in the separation of powers established by our constitutional scheme and made deci-

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[5]See also *International Tel. & Tel. Corp. v. Alexander*, 396 F. Supp. 1150, 1163 n.31 (D. Del. 1975) (discussing federal tax protest and remedy statutes and declaring, "As previously noted, both statutes are jurisdictional and are within the power of Congress to enact pursuant either to Art. III, § 1 of the Constitution or the sovereign immunity of the federal government. ... These respective sources of power, however, cannot be utilized by Congress to shield from judicial review governmental action violative of constitutional guarantees.").

sively explicit in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

The Supreme Court has recognized that procedural requirements in tax refund cases must satisfy all the provisions of the Constitution. Discussing procedural obstacles which might bar a refund of state taxes collected in violation of the Constitution, the Court declared, "Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim." *Hyde*, 115 S. Ct. at 1750 (emphasis added). In this vein the Court has indicated that states may enforce "relatively short statutes of limitation applicable to such actions." *McKesson*, 496 U.S. at 45 (citing Florida's three-year statute of limitations for tax refund suits). Although states may promulgate statutes of limitations in connection with tax refund statutes, they are bound to provide substantive relief for revenue exacted in violation of the Constitution. A state's post-deprivation tax refund regime must afford "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40 (quoting *Atchison, T. & S. F. R. Co. v. O'Connor*, 223 U.S. 280, 285, 56 L. Ed. 436, 32 S. Ct. 216 (1912)). Moreover, when a state places taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. 496 U.S. at 31.

In tax refund cases the Fifth Amendment Due Process Clause does not endow the federal government with the flexibility the states enjoy when fashioning schemes to redress unconstitutional exactions. The relevant state obligations under the Fourteenth Amendment Due Process Clause owe their flexible nature to principles of federalism and comity:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. ... This Court [has repeatedly] shown an aversion to federal interference with state tax administration. ... The reluctance to interfere in state tax collection continued in *McKesson*, in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 132 L. Ed. 2d 509, 115 S. Ct. 2351, 2354 (1995) (citation omitted). In the instant case, there exists no question of "comity" between the federal government and a state, and under *McKesson* and its progeny, a two-year statute of limitations in tax refund cases may well be unconstitutional at the state level. Although there is no precedent directly on point, it is evident that in this case, the more stringent due process obligations incumbent on the federal government entail that enforcing the two-year statute of limitations would infringe Fifth Amendment rights by, inter alia, failing "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

There is no need to speculate on a constitutionally permissible term for a statute of limitations in this type of case. Having found the statute of limitations inapplicable, it is my opinion that the imperatives of due process require a full refund back to the date of the Act's implementation, i.e., 1987 (the bulk of unconstitutional exactions appear to have occurred subsequent to the increase of the tax from .04% to .125%, in 1991). Although the government has a legitimate interest in orderly and predictable tax administration, Justice O'Connor explained that "*McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 184, 110 L. Ed. 2d 148, 110 S. Ct. 2323 (1990). Any misplaced concern for visiting hardship upon the government by requiring

a complete refund of the unconstitutionally exacted taxes is dispelled by the fact that at the end of fiscal year 1994, the fund generated by the Act contained a $ 453 million surplus,[6] while the total sums collected since the Act's inception amounted to $ 2.7 billion, $ 700 million of which was derived from unconstitutional export taxes. (Def's. Mem. Supp. Summ. J. at 5). Furthermore, the fund's cumulative surplus is expected to balloon to nearly $ 1.7 billion by the end of fiscal year 1999.[7] Under the circumstances, restitution of all unconstitutional exactions collected since the Act's implementation is appropriate where such relief is requested.

R. KENTON MUSGRAVE

Judge

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[6] Dept. of the Treasury, Financial Management Service, Funds Account Branch, Harbor Maintenance Trust Fund Income Statement and Balance Sheet, 10/1/93-9/30/94.

[7] Army Corps of Engineers Internal Briefing Outline (Feb. 2, 1995).

UNITED STATES SHOE CORPORATION,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

Court No. 94-11-00668

UNITED STATES COURT
OF INTERNATIONAL TRADE

19 C.I.T. 1413; 924 F. Supp. 1191;
1995 Ct. Intl. Trade
LEXIS 247; SLIP OP. 95-197

December 4, 1995, Decided

JUDGES:

BEFORE: THE HONORABLE DOMINICK L. DiCARLO, CHIEF JUDGE, AND JANE A. RESTANI and R. KENTON MUSGRAVE, JUDGES.

OPINION BY:

Dominick L. DiCarlo; Jane A. Restani; R. Kenton Musgrave

JUDGMENT

Upon consideration of plaintiff's and defendant's motions for summary judgment, pursuant to Rule 56 of the Rules of this Court, the submissions of amici, the record, and other pertinent papers, it is hereby

ORDERED that plaintiff's motion for summary judgment is GRANTED; and it is further

ORDERED that defendant's motion for summary judgment is DENIED; and it is further

ORDERED that the Harbor Maintenance Tax imposed, pursuant to the Harbor Maintenance Revenue Act of 1986, Pub. L. No. 99-662, 100 Stat. 4266, on merchandise exported from the United States be, and hereby is, declared to be unconstitutional as a violation of Article I, Section 9, Clause 5 of the United States Constitution; and it is further

ORDERED that the United States Customs Service is hereby enjoined, as of the date of the entry of this Judgment, from the assessment and collection of the Harbor Maintenance Tax in connection with merchandise exported from the United States; and it is further

ORDERED that a money judgment is awarded plaintiff in the amount of $ 8,281.87, together with interest and costs as provided by law.

Dominick L. DiCarlo, Chief Judge

Jane A. Restani, Judge

R. Kenton Musgrave, Judge

Dated: New York, New York, This 4th day of December, 1995.

UNITED STATES SHOE CORP.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Court No. 94-11-00668

UNITED STATES COURT
OF INTERNATIONAL TRADE

19 C.I.T. 1419; 924 F. Supp. 1191; 1995 Ct. Intl. Trade LEXIS 248; SLIP OP. 95-199

December 4, 1995, Decided

JUDGES:

BEFORE: THE HONORABLE DOMINICK L. DiCARLO, CHIEF JUDGE, AND JANE A. RESTANI and R. KENTON MUSGRAVE, JUDGES.

OPINION BY:

Dominick L. DiCarlo; Jane A. Restani; R. Kenton Musgrave

ORDER

Upon consideration of defendant's motion for a stay of enforcement of judgment, it is hereby

ORDERED that defendant's motion is GRANTED; and it is further

ORDERED that execution of the money judgment awarded and the effect of the declaratory and injunctive relief granted are stayed until the later of (1) the expiration of the period for filing a notice of appeal; or (2) the conclusion of any appellate proceedings.

Dominick L. DiCarlo, Chief Judge

Jane A. Restani, Judge

R. Kenton Musgrave, Judge

Dated: New York, New York, This 4th day of December, 1995.

UNITED STATES SHOE CORPORATION,
Plaintiff-Appellee,
v. THE UNITED STATES,
Defendant-Appellant.

96-1210

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

114 F.3d 1564; 1997 U.S. App. EXIS 13032; 97-1 U.S. Tax Cas. (CCH) P70,078; 79 A.F.T.R.2d (RIA) 2813; 1997 AMC 2551

June 3, 1997, DECIDED

SUBSEQUENT HISTORY:

As Amended June 13, 1997.

PRIOR HISTORY:

Appealed from: United States Court of International Trade. Senior Judge DiCarlo.

DISPOSITION:

AFFIRMED.

COUNSEL:

Brian S. Goldstein, Siegel, Mandell & Davidson, P.C., of New York, New York, argued for plaintiff-appellee. With him on the brief were Steven S. Weiser, Laurence M. Friedman, Paul A. Horowitz, and Gregory S. McCue.

David M. Cohen, Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for defendant-appellant. With him on the brief were Frank W. Hunger, Assistant Attorney General, Jeanne E. Davidson, Assistant Director, and Todd M. Hughes, Attorney. Of counsel on the brief were Richard McManus, Office of the Chief Counsel, United States Customs Service, and Martin R. Cohen, Office of the General Counsel, Army Corps of Engineers, of Washington, D.C.

Melvin S. Schwechter, LeBoeuf, Lamb, Greene & MacRae, L.L.P., of Washington, D.C., for amici curiae Aluminum Company of America, et al. With him on the brief were John C. Cleary and Julie A. Coletti.

Thomas J. Kovarcik, of Irving A. Mandel, Counselor At Law, for amicus curiae Allied Textile Sales Company. With him on the brief were Irving A. Mandel, Steven R. Sosnov, and Jeffrey H. Pfeffer.

Robert E. Burke, Barnes, Richardson & Colburn, of Chicago, Illinois, for amicus curiae Amoco Chemical Company. With him on the brief were Christopher E. Pey and Cindy H. Chan. Of counsel was Lawrence M. Friedman.

John M. Peterson, Neville, Peterson & Williams, of New York, New York, for amici curiae Aris-Isotoner, Inc., et al. Of counsel on the brief were George W. Thompson, James A. Marino, and Arthur K. Purcell.

Mark S. Zolno, Katten, Muchin & Zavis, of Chicago, Illinois, for amici curiae Baxter Healthcare Corporation, et al. With him on the brief were Michael E. Roll and Gregory W. Bowman.

William D. Outman, II, Baker & McKenzie, of Washington, D.C., for amici curiae Brown-Forman Corp., et al.

With him on the brief were Kevin M. O'Brien, Lynn S. Baker, and Teresa A. Gleason.

Barry E. Cohen, Crowell & Moring, L.L.P., of Washington, D.C., for amicus curiae E.I. du Pont de Nemours & Co.

Patrick D. Gill, Rode & Qualey, of New York, New York, for amici curiae General Chemical Corporation, et al. With him on the brief were John S. Rode, Michael S. O'Rourke, and R. Brian Burke.

Steven P. Florsheim, Grunfeld, Desiderio, Lebowitz & Silverman LLP, of New York, New York, for amici curiae Mondial International Corp., et al. With him on the brief were Robert B. Silverman and Erik D. Smithweiss.

Frederic L. Wood, Donelan, Cleary, Wood & Maser, P.C., of Washington, D.C., for amicus curiae The National Industrial Transportation League. With him on the brief were Nicholas J. DiMichael, and Antoine P. Cobb.

Munford Page Hall, II, Dorsey & Whitney LLP, of Washington, D.C., for amicus curiae New Holland North America, Inc. With him on the brief were John B. Rehm, Robert W. Bras, and Karen A. Zughaib.

Peter Buck Feller, McKenna & Cuneo, L.L.P., of Washington, D.C., for amicus curiae Swisher International, Inc. With him on the brief were Lawrence J. Bogard, Joseph F. Dennin, Michael K. Tomenga, and Brian J. O'Shea.

Steven H. Becker, Coudert Brothers, of New York, New York, for amici curiae Texaco Refining and Marketing Inc., et al. With him on the brief were Charles H. Critchlow and Claire R. Kelly.

JUDGES:

Before MAYER, MICHEL, RADER, and BRYSON, Circuit Judges, and SMITH, Senior Circuit Judge. Opinion for the court filed by Circuit Judge MICHEL. Dissenting opinion filed by Circuit Judge MAYER.

OPINION BY:
MICHEL

OPINION:

MICHEL, Circuit Judge. The United States ("the government") appeals from the December 4, 1995 decision of the United States Court of International Trade granting summary judgment to United States Shoe Corporation ("US Shoe") and holding that the court possessed jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), not 28 U.S.C. § 1581(a), that the Harbor Maintenance Tax ("HMT") violates the United States Constitution and is therefore void as applied to exports. See *United States Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The case was submitted for our decision after oral argument by the parties before a five-judge panel on February 7, 1997, following briefing not only by the parties but also by numerous amici. The Court of International Trade correctly exercised jurisdiction under 28 U.S.C. § 1581(i) and correctly concluded that the HMT violates the Export Clause, U.S. Const., Art. 1, § 9, cl. 5, because it is a tax on exports rather than a user fee. The HMT, as applied to exports, is not a user fee but rather a tax because it is paid by the exporter, not the direct user of the harbor, and is calculated solely based on the value of the cargo loaded for export and bears no reasonable relationship to the cost of the use of the port facilities maintained by the government and therefore cannot be a fair approximation of use. We therefore affirm the judgment invalidating the HMT as applied to exports and ordering a refund to US Shoe.

BACKGROUND

The HMT was imposed by Congress as part of the Comprehensive Water Resources Development Act of 1986 ("the Act"), Pub. L. No. 96-622, 100 Stat. 4082 (codified at 26 U.S.C. § 4461). The Act also established the Harbor Maintenance Trust Fund ("the Trust Fund") to provide for the operation and maintenance of channels and harbors. The details of the HMT, the Act, and the Trust Fund relevant to this lawsuit are set forth in the trial court's opinion and are not repeated here in detail. See *United States Shoe*, 907 F. Supp. at 411-12.

In short, the Act imposes an ad valorem tax of 0.125 percent of the value of the commercial cargo involved in "any port use" of federally maintained navigable waterways. 26 U.S.C. § § 4461, 4462(a)(2) (1994). The HMT is imposed on both exports and imports. As it specifically applies to exports, the HMT statute provides:

> (a) General rule.--There is hereby imposed a tax on any port use.
>
> (b) Amount of tax.--The amount of tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of tax.--
>
> (1) Liability.--The tax imposed by subsection (a) shall be paid by--
>
> (B) in the case of cargo to be exported from the United States, the exporter ....
>
> (2) Time of imposition.--Except as provided by regulations, the tax imposed by subsection (a) shall be imposed--
>
> (A) in the case of cargo to be exported from the United States, at the time of loading ....

26 U.S.C. § 4461 (1994) (emphasis added). The term "port use" is defined as "the loading of commercial cargo on, or ... the unloading of commercial cargo from, a commercial vessel at a port." 26 U.S.C. § 4462(a)(1) (1994). The term "port" is defined as "any channel or harbor (or component thereof) in the United States, which ... (i) is not an inland waterway, and (ii) is open to public navigation." 26 U.S.C. § 4462(a)(2)(A) (1994). The term "commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire," but does not include "bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or ... fish or other aquatic animal life caught and not previously landed on shore." 26 U.S.C. § 4462(a)(3) (1994). Thus, although there are certain exemptions, the tax is generally imposed against all imports, exports, domestic shipments, and passengers.[1] See 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A) (1994). Money collected pursuant to the Act is transferred by Customs to the Trust Fund for disbursal upon further appropriation by Congress. See 26 U.S.C. § 9505(b) (1994). The fees were designed to finance the cost of harbor dredging. See S. Rep. No. 99-126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647. By the end of fiscal year 1994, the total amount of fees collected and deposited in the Trust Fund was over 2.7 billion dollars, of which over 700 million dollars was paid by exporters.

Although the HMT was first enacted in 1986, there were no constitutional challenges until recently. US Shoe paid the HMT on articles exported for the period April 1 through June 30, 1994. US Shoe then brought suit in the Court of International Trade for the refund of these payments on the ground that the HMT, as applied to exports, is unconstitutional. In January 1995, given the large number of pending lawsuits challenging

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[1] For passengers the tax is calculated based on the charge assessed for transportation. See 26 U.S.C. § 4462(a)(5)(B) (1994).

the constitutionality of the HMT[2] the Court of International Trade established a three-judge panel and heard this case as a test case. See 28 U.S.C. § 255 (1994) (authorizing the chief judge of the Court of International Trade to designate a three-judge panel to hear cases raising the constitutionality of any Act of Congress or which have broad or significant implications in the administration or interpretation of customs laws).

The parties filed cross-motions for summary judgment and, on October 25, 1995, the trial court issued its decision granting US Shoe's motion for summary judgment. *United States Shoe*, 907 F. Supp. at 408. The trial court first concluded that the HMT was unconstitutional as applied to exports because it constituted a tax, rather than a user fee, as it did not have regulation as its primary purpose and it did not recoup the costs of services provided to the payor. *Id.* at 413-18. Specifically, the trial court noted that "the Act neither discourages nor regulates use of a harbor; neither does it so intend." *Id.* at 413. The trial court also found that "the primary purpose of the [HMT] is to raise revenue, as Congress has imposed 'a duty under the pretext of fixing a fee.'" *Id.* at 414 (citation omitted). The trial court further determined that jurisdiction was not properly based on 28 U.S.C. § 1581(a), because there was no decision of Customs to protest. *Id.* at 418-21. In part, the trial court relied on the fact that "Customs does not determine the application, policies, or rates of the [HMT], but merely serves to implement its provisions." *Id.* at 420. Rather, the trial court held jurisdiction was properly based on 28 U.S.C. § 1581(i) because Congress directed that the HMT be treated as a customs duty and

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[2] As of the summer of 1996, there were approximately 2400 complaints pending in the Court of International Trade, as well as approximately 40 complaints pending before the Court of Federal Claims and one complaint pending in district court. The great majority of these lawsuits have been stayed pending the outcome of this appeal.

because customs duties, by their very nature, provide for revenue from imports. *Id.* at 421. The Court of International Trade enjoined the government from assessing and collecting the HMT and ordered the parties to file a proposed judgment.

The government appealed, urging that we hold that jurisdiction over these disputes is only proper pursuant to 28 U.S.C. § 1581(a) and that the HMT is constitutional. We heard this case as a five-judge panel pursuant to Local Rule 47.2, which states that "appeals in cases from the Court of International Trade decided by a three-judge court pursuant to 28 U.S.C. § 255 will ordinarily be referred to a panel of five judges." Fed. Cir. R. 47.2.

ANALYSIS

We "review the summary judgment in this case 'for correctness as a matter of law, deciding de novo the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist.'" *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993) (quoting Guess? *Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991)). Here, the parties do not dispute any facts, but only dispute questions of law relating to the proper interpretation of the jurisdictional statutes and the constitutionality of the HMT as applied to exports.

I.

The parties do not dispute that the Court of International Trade possesses exclusive jurisdiction over this type of matter seeking a refund of HMT pursuant to 28 U.S.C. § 1581, in light of Congress' provision that "for purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2) (1994). The only dispute is whether subsection (a) or subsection (i) of section 1581 applies. The dispute exists be-

cause subsection (a) requires that the exporter first file a protest and limits recovery to amounts protested within 90 days of payment, while subsection (i) states only that the action must be initiated within two years of the date on which the cause of action accrued.

The relevant statutory subsections provide as follows:

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subjection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for -

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section. ...

28 U.S.C. § 1581 (1994).

A.

Although admitting that it does not fit perfectly, the government argues that subsection 1581(a) nevertheless confers jurisdiction over this dispute. The government argues section 1581(a) is the "established route" for obtaining judicial review of duties, charges, and exactions imposed by Congress. As

Congress envisioned that the HMT would be treated like a duty, the government argues jurisdiction under this subsection is the only logical result. The government admits, as it must, that subsection (a) requires that prior to the time an exporter can seek judicial review, Customs must issue a decision, the decision must be protested, and the protest must be denied. See 19 U.S.C. §§ 1514 (stating that decisions of the Customs Service are final unless a protest is filed), 1515 (stating that all protests will be reviewed within two years of filing). The government argues that the relevant "decision" is Customs' acceptance of the exporter's payment. In support, the government points to a generic regulation suggesting that the date of exaction (the date of payment) constitutes a protestable event. See 19 C.F.R. § 174.12(e) (1996) ("Protests shall be filed ... within 90 days after ... the date of the decision, involving neither a liquidation nor reliquidation, as to which the protest is made (e.g., the date of an exaction ...."). According to the government, this regulation eliminates any confusion regarding the availability, timing or other procedures applicable to a protest and over 1000 HMT protests have been received by Customs pursuant to this regulation.

Relying on legislative history, US Shoe responds that Congress directed that the HMT be treated like a duty so that the Court of International Trade, with its expertise in international trade matters, would have jurisdiction over any disputes and so as to facilitate Customs' collection and processing of the HMT. See H. Rep. No. 99-228 at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714-15 ("In order to facilitate administration and collection of the port user charges [i.e., the HMT] by the U.S. Customs Service, ... all administrative and enforcement provisions ... are to apply ... as if such charges were customs duties."). Thus, according to US Shoe, it is not clear that Congress intended for jurisdiction over this type of dispute to fall within a particular subsection of section 1581, and there is no evidence that Congress intended to amend the requirement of 19 U.S.C. § 1514 that there must be a Customs "decision"

before filing a protest. US Shoe further argues that acceptance of payment is not a protestable decision and that therefore subsection (a) cannot apply.

We find US Shoe's arguments persuasive. Subsection (a) is not directly applicable because it applies to suits commenced to contest the denial of a protest. Decisions of the Customs Service are final unless a protest is filed. 19 U.S.C. § 1514(a) (1994). Decisions can refer to, for example, "the classification and rate and amount of duties chargeable" or "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." *Id.* While the HMT is likely a charge or exaction, we do not believe that the actual payment or receipt of the HMT can be a "decision" of Customs, as Customs has not made any decision -- it merely passively collects money in the amount required by the statute. Customs doesn't even notify exporters of the need to pay the HMT; rather, the exporter pays all accumulated fees on a quarterly basis by simply mailing a check or money order to Customs along with appropriate forms. See 19 C.F.R. § 24.24(e)(2)(ii) (1996).

Typically, "decisions" of Customs are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty. Indeed, prior case law indicates that Customs must engage in some sort of decision-making process in order for there to be a protestable decision. Thus, for example, in *Dart Export Corp. v. United States*, 43 C.C.P.A. 64 (1956), one of our predecessor courts held that Customs' acceptance of estimated duties paid by an importer upon entry did not constitute a final, protestable decision which would deprive the government of the right to liquidate the entry at a later date, because the payment was based entirely on information provided by the importer, rather than after analysis and adjudication by Customs. *Id.* at 69-70, 74. Likewise, here, the HMT is based entirely on the exporter's information and calculation. See 19 C.F.R. § 24.24(e)(2)(i) (1996). Specifically, this regulation provides that:

> When cargo is loaded on a commercial vessel for export at a port within the definition of this section, the exporter of that cargo (the name that appears on the SED or equivalent document authorized under 15 CFR 30.39(b)) is liable for the payment of the port use fee at the time of loading. The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation.

Id. Thus, Customs merely passively collects payments calculated by the exporters pursuant to statutes and regulations and performs no active role whatsoever. It performs no analysis; it issues no directives or decisions; it imposes no liabilities.

Similarly, in *Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994), this court held that the Court of International Trade lacked jurisdiction over Mitsubishi's complaint under section 1581(a) because the Customs Service did not make any antidumping "decisions" as Customs merely followed the Department of Commerce's instructions in assessing and collecting specified duties. *Id.* at 977. The court pointed out that Customs' role was merely ministerial and that Customs did not determine the rate or amount of the antidumping duties. *Id.* Commerce actually conducted the antidumping duty investigation, calculated the antidumping duties, and issued the antidumping order; Customs merely collected the estimated duties. *Id.* at 976. Likewise, here, there was nothing for Customs to decide, because all substantive particulars regarding the imposition and amount of HMT are established by Congress. The amount of the HMT (0.125 percent of the value of the commercial cargo) is set by statute, 26 U.S.C. § 4461, and the exporter performs the calculation, 19 C.F.R. § 24.24. Customs is merely collecting the HMT in the amount and manner specified by Congress. Thus, there is simply no decision that US Shoe could have protested, or should have been required to protest, in order to allow the Court of International Trade to hear this dispute.

Norfolk & W. Ry. v. United States, 843 F. Supp. 728 (Ct. Int'l Trade 1994), aff'd, 62 F.3d 1395 (Fed. Cir. 1995), relied on by the government, is not to the contrary. There, a railroad company brought an action challenging user fees collected on vehicles and vessels entering the United States. *Id.* at 729. The railroad company filed a user fee refund request with the Secretary of the Treasury on the grounds that its railroad barges were not ferries and that, as barges, they were subject to a cap on user fees. *Id.* at 730. The refund request was granted. However, several years later, Customs informed the railroad company that its barges were indeed ferries and not subject to the cap. *Id.* The court concluded that the user fees were charges subject to protest and that jurisdiction fell under 1581(a). *Id.* at 732-33 ("The user fees at issue in this case are clearly 'charges' within the meaning of § 1514(a) and, therefore, are subject to protest under this subsection."). A careful reading of this case, however, makes clear that the user fees were protestable charges because there had been a specific decision by Customs applying statutory definitions that certain vessels were ferries rather than barges, thus subjecting the cargo to user fees. *Id.* at 730, 733. There, Customs was authorized to collect certain user fees on vehicles and vessels entering the United States. *Id.* at 729. The Railway transported railroad cars on barges into the United States from Canada. *Id.* The amount of fees due varied based on whether the barge was considered a ferry or not. The Railway was notified by Customs that it was required to pay a $ 7.50 user fee for each of the railroad cars, but no fees for its barges because Customs considered the barges to be ferries. *Id.* at 730. The Railway filed a protest of that decision. There is no comparable analysis and decision here. This is not a case where, for example, US Shoe contended its exports fell within one of the HMT exemptions and Customs decided to the contrary.

We therefore hold that because the collection of the HMT does not involve a protestable decision on the part of Customs, the trial court correctly concluded that jurisdiction over this

dispute did not arise under 28 U.S.C. § 1581(a). In light of this holding, we need not reach US Shoe's additional arguments that any protest it might have filed would have been futile or manifestly inadequate.

B.

Given that the Court of International Trade did not possess jurisdiction under 28 U.S.C. § 1581(a), if it possessed jurisdiction over this dispute, as the government concedes that it did, it can only have been pursuant to the default provision, 28 U.S.C. § 1581(i). The government argues subsection 1581(i) cannot apply because that subsection provides for jurisdiction in only those limited circumstances when jurisdiction under any of the other subsections is unavailable or manifestly inadequate. However, this is no bar to jurisdiction here because jurisdiction under the other subsections, specifically subsection (a) -- the only other arguable possibility -- is unavailable. The government also argues that, by its own terms, subsection 1581(i) applies only to imports, not to exports.

We do not agree. As US Shoe persuasively argues, the Court of International Trade properly exercised its jurisdiction under 28 U.S.C. § 1581(i). Congress expressly directed that for jurisdictional, administrative and enforcement purposes, the HMT was deemed to be a customs duty. Thus, it is beyond dispute that Congress intended the Court of International Trade to have jurisdiction over disputes regarding the HMT, as the Court of International Trade has exclusive jurisdiction over customs matters. Moreover, there is no argument made by either US Shoe or the government that the Court of International Trade can exercise jurisdiction over this dispute pursuant to any statute other than 28 U.S.C. § 1581. As discussed above, subsection 1581(a) does not apply. The only other credible, and indeed the only other argued, possibility is subsection 1581(i). Admittedly, subsection (i) does not specifically refer to disputes concerning the constitutionality of fees such as the HMT. It does, however, specifically refer to the "administration and

enforcement with respect to the matters referred to in" the preceding paragraphs, including any law providing for revenue from imports. This dispute does involve the "administration and enforcement" of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports. Additionally, the mere fact that subsection 1581(i) does not speak precisely to this issue and does not use the word "exports" is not dispositive, as it "was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions ...." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994) (emphasis added).

Thus, in light of the fact that the HMT is a law providing for revenue from imports (as well as exports) and the fact that subsection 1581(i) grants broad residual authority concerning import transactions to the Court of International Trade, the trial court properly asserted jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(i). We must therefore consider whether the trial court correctly held that the HMT, as applied to exports, is unconstitutional.[3]

II.

The United States Constitution provides that:

> No Tax or Duty shall be laid on articles exported from any State.

U.S. Const., Art. I, § 9, cl. 5. The Supreme Court recently analyzed the Export Clause in *United States v. International Bus. Mach.*, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996). There, the Supreme Court held that the Export Clause does not permit "the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *IBM*, 116 S. Ct. at 1795.

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[3] We need not and do not address the constitutionality of the HMT statute as applied to anything except exports.

In other words, even those taxes that are imposed equally on exports and imports or other articles of commerce are prohibited by the Export Clause. See *id.* at 1803. ("The better reading [of the Export Clause], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all.") (emphasis added). Thus, if the HMT is a tax on goods in export transit, it is invalid. We address first whether the HMT is a tax and second whether the HMT is imposed on goods in export transit.

A.

The HMT statute provides:

(a) General rule.--There is hereby imposed a tax on any port use.

(b) Amount of tax.--The amount of tax imposed by subsection

(a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax.--

(1) Liability.--The tax imposed by subsection (a) shall be paid by--

(B) in the case of cargo to be exported from the United States, the exporter

(2) Time of imposition.--Except as provided by regulations, the tax imposed by subsection (a) shall be imposed--

(A) in the case of cargo to be exported from the United States, at the time of loading ....

26 U.S.C. § 4461 (1994) (emphasis added). Thus, this statute, at least as it applies to exports, appears to be a prohibited tax on exports in that the tax is imposed based on the value of the exported goods and accrues at the time the goods are loaded on a ship for export. Although the legislative history refers to the HMT as a user fee, the statute itself repeatedly refers to the HMT as a tax and is codified in the Internal Revenue Code.

The government, however, argues that the fact that the HMT is referred to as a tax is not dispositive and that the HMT is actually a user fee, not a tax. The test used to distinguish between taxes and user fees was first articulated in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972), and more recently applied in *Massachusetts v. United States*, 435 U.S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978). That test states that user fees are valid as such so long as they: (1) do not discriminate against the constitutionally protected interest (here, exports); (2) are based on a fair approximation of use; and (3) are not excessive in relation to the cost to the government of the conferred benefits. See *Massachusetts*, 435 U.S. at 464. We need not decide whether the HMT discriminates against exports or is excessive in relation to the cost to the government of the conferred benefits. Instead, we discuss only whether the HMT is based on a fair approximation of use.

US Shoe argues, and the trial court held, that the HMT is not a fair approximation of the cost of the benefits received by exporters because there is no correlation between the amount of HMT an exporter pays and the amount the exporter uses the port. In other words, the amount of the HMT has no relationship to the size or weight of the vessel or the necessary depth of the port required by the vessel. For example, "low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters." *US Shoe*, 907 F. Supp. at 415. Yet, even though the bulk cargo exporters generally require a larger vessel and a deeper port, and therefore "use" the port to a greater extent, they pay a lower tax than high value, low bulk cargo exporters. Moreover, a ship that docks but does not load or unload cargo is not required to pay a fee, even though that ship otherwise utilizes the port. Additionally, there is apparently no correlation between the amount of fees collected at a particular port and the expenditure of funds from the Trust Fund to maintain that

particular port. Indeed the trial court found that "most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures." *Id.* Finally, it is not consistent with a true user fee that so many users are exempted, such as those carrying bunker fuel, ship's stores, equipment necessary for the operation of the vessel and fish and other aquatic animal life not previously landed on shore, 26 U.S.C. § 4462(a) (1994), since ships carrying these products use the port facilities to the same extent as ships carrying products subject to the HMT.

The government argues that the HMT is based on a fair approximation of use and, in support, relies on other cases in which similar ad valorem user fees have been upheld. The government first relies on *United States v. Sperry Corp.*, 493 U.S. 52, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989), where the Supreme Court held that a user fee of 1.5% of all awards recovered from the Iran-United States Claims Tribunal was not an unconstitutional taking but a valid user fee. There, Sperry had argued that the fee could not be a user fee because it did not bear any relationship to the cost of the tribunal to the United States or the value of the tribunal to Sperry. *Id.* at 60. In rejecting this argument, the Court stated that a user fee need not be "precisely calibrated to the use that a party makes of government services" and need only be a "fair approximation." *Id.* The Court also recognized that, where user fees are applied to a large number of parties, some users will be charged more and some less than in a perfect user-fee system. *Id.* at 61. Here, the government argues that, as in *Sperry*, the fact that the benefits received do not exactly correspond to the amount of the HMT does not render the HMT statute unconstitutional.

We do not find *Sperry* dispositive for two reasons. First, unlike the present case, in *Sperry* the person receiving the award and paying the fee was the direct beneficiary of the process for which they were paying. In other words, parties that had their claims adjudicated by the tribunal or otherwise received the benefit of the tribunal were required to pay the costs

of establishing and maintaining the tribunal. Here, on the other hand, as applied to exports, the direct users -- the ship owners -- do not contribute to the maintenance of the port and it is only indirect users -- the export companies -- that are required to pay the HMT. Second, the *Sperry* Court, in distinguishing a case holding registration and axle taxes unconstitutional as a violation of the Commerce Clause, stated that the standard applied under the Just Compensation Clause was less strict than that which would be applied in a Commerce Clause analysis where one is concerned about discrimination against interstate commerce. *Id.* at 61. To this we would add that, per *IBM*, the Export Clause is still more restrictive. See *IBM*, 116 S. Ct. at 1799 ("Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.") (footnote omitted).

The government also relies on *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), where the Eleventh Circuit concluded that an airport access fee enacted to provide funds to maintain the airport and based on a rental car company's gross business receipts was a valid user fee. Alamo argued the fee was not a fair approximation because it bore no relation to Alamo's use of the airport and instead varied in proportion to the revenue generated by Alamo's customers. *Id.* at 520. Alamo argued that its only use of the airport was to drive on the airport roads to pick up customers and that its fee should be limited to a pro rata road use fee. *Id.* at 519. The court disagreed, reasoning as follows:

> Although imprecise in particular applications, the Authority's decision to measure Alamo's use of the airport facility by the gross receipts generated from Alamo's airport

> customers is not irrational. The Authority could reasonably conclude that the ten percent fee on average represents Alamo's use of the airport facility. It stands to reason that in general the more money Alamo makes from airport passengers, the more trips Alamo has made to the airport.

Id. at 520 (emphasis added). Thus, while imprecise, the fee was not unfair or irrational, but was instead a "fair approximation." Again, the payer of the fee in Alamo was the direct beneficiary of the use of the airport, unlike here where the exporter is not the direct beneficiary and is not assured harbor maintenance at the harbor where the exporter's goods are loaded. Moreover, in rejecting Alamo's argument that the fee was unreasonable because it was required to pay a greater fee for a person who rented a car for seven days than for a person who only rented a car for one day even though each individual made equal use of the airport, there the court found that the 10% fee was acceptable because it represented, on average, Alamo's use of the airport. *Id.* Here, there is no such finding that the HMT represents, on average, an exporter's use of the port and, as discussed above, the court concluded that the HMT was not based on a fair approximation of use, thereby implicitly finding that the HMT did not represent, on average, an exporter's use of the port.

The government also argues, without providing any support, that by using the words "fair approximation of use" the Supreme Court in *Massachusetts* intended to refer to the value of the benefits received, rather than the costs of the benefits received. The government then asserts that the HMT is a fair approximation of the value of the benefits received because the profitability of higher value cargo is higher than for lower value cargo. We do not agree. First, the *Massachusetts* case itself suggests that the cost of the benefits, rather than the value, is the appropriate measure in its statements that "Congress believed that four measures, taken together, would fairly reflect some of the cost of the benefits" and "the present scheme nevertheless is a fair approximation of the costs of the benefits

each aircraft receives." 435 U.S. at 468 (emphasis added). Second, higher value merchandise does not always correlate to a higher profit margin and the government has failed to present any facts that would suggest that, even on average, this is the case. Thus, exporters of higher value goods do not necessarily receive a greater benefit, even in terms of value, than exporters of lower value goods. Third, the exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use. Fourth, the HMT does not pay for services, such as police, fire or rescue units, that provide benefits to the exporters by keeping the harbors safe whether the exporters use those services or not. See *Maine v. Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992) (refusing to grant summary judgment that fee used to pay for a hazardous waste spill response team was not based on a fair approximation of use because, even though the Navy had not yet needed the team, it was available to minimize any future spill at the shipyard).[4] Therefore, even if the value of the benefits received is an accurate measure, we hold that the HMT is not a fair approximation of the value of the benefits received by the exporters.

We therefore hold that the HMT is not based on a fair approximation of use and, as such, is not a permissible user fee. Although the decision to impose the HMT on an ad valorem basis may have substantially reduced administrative costs and burdens, it is nevertheless not based on a fair approximation of use. Since the HMT is not a valid user fee, it must be a tax.

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[4] Notably, in this case the appellate court rejected the Navy's argument that the measure of the authorized fee for services is the value to the recipient. See *Maine*, 973 F.2d at 1014.

B.

The government also argues the HMT is not levied against exported articles and, therefore, even if it is a tax, it is not unconstitutional. Rather, according to the government, the fee is imposed on the use of federally maintained harbors by shippers,[5] exporters[6] and importers[7] of commercial cargo, regardless of destination, and is even imposed on the transportation of passengers. Thus, according to the government, the HMT is "an ordinary burden of taxation" rather than a tax or duty imposed on "exported articles."

We do not agree. The Constitution prohibits taxation of articles in the course of being exported. See *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69, 67 L. Ed. 865, 43 S. Ct. 485 (1923) ("The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State,' because that is forbidden in terms by the Constitution."). Thus, while a tax may be constitutional if imposed on goods during the manufacturing process, even if they are intended for later export, a tax is not constitutional if imposed on those very same goods after they are loaded on a vessel for export or if imposed when delivered to the carrier for export. See *id.* (holding unconstitutional a tax on baseball bats and balls imposed on "the very act that passed the title and that would have incurred the

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[5] Shippers, i.e., the persons or corporations that pay the freight, are responsible for paying the HMT on commercial shipments within the United States. See 19 C.F.R. § 24.24(e)(1)(i) (1996).

[6] Exporters, i.e., the persons or corporations whose name appears on the SED document or the equivalent document, are liable for the HMT on exports. See 19 C.F.R. § 24.24(e)(2)(i) (1996).

[7] Importers are liable for the HMT on imports. See 19 C.F.R. § 24.24(e)(3)(i) (1996).

tax had the transaction been domestic, [and that] committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods."). Here, the HMT is imposed on an ad valorem basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(a), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). See also 19 C.F.R. § 24.24(e)(2)(i) ("The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation."). Thus, we conclude that the HMT, as applied against US Shoe, is imposed on exports.

C.

The government makes several additional arguments in support of the constitutionality of the HMT. First, the government argues that the Export Clause is distinct from the Commerce Clause and, consequently, Congress may impose a tax or duty pursuant to its authority to regulate commerce, so long as the purpose of the tax or duty is not to raise revenue for the general welfare. See *Armour Packing Co. v. United States*, 209 U.S. 56, 79, 52 L. Ed. 681, 28 S. Ct. 428 (1908) ("But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and, unless the alleged interference amounts to such taxation or duty, it does not come within the constitutional prohibition."). Thus, according to the government, the relevant inquiry is whether the HMT was enacted pursuant to Congress' authority to regulate commerce, not whether it imposes a burden on exports. See *New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal Dist.*, 874 F.2d 1018, 1021-22 (5th Cir. 1989) (holding that a

port could impose reasonable fees against ships to finance emergency response services). Second, the government argues that the trial court adopted an overly broad interpretation of the Export Clause because it failed to recognize that the sole purpose of the Export Clause was to prevent the northern states from crippling the export-dependent southern states -- not to restrict Congress' authority to impose nondiscriminatory fees designed to recoup costs.

We do not agree. The Supreme Court recently reaffirmed the breadth of the Export Clause in the face of the argument that its historical purpose justified a narrow construction. *IBM*, 116 S. Ct. at 1803 ("While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language."). Moreover, the power to regulate commerce cannot completely override the effect of the Export Clause. See *North Am. Co. v. SEC*, 327 U.S. 686, 704-05, 90 L. Ed. 945, 66 S. Ct. 785 (1946) ("This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as section 9 of Article 1 and the Bill of Rights."); see also *IBM*, 116 S. Ct. at 1798 (rejecting government's request to "reinterpret the Export Clause to permit the imposition of generally applicable, nondiscriminatory taxes as [the Court has] under the Commerce Clause ...."). It is undeniable that Congress may regulate commerce by means such as encouraging or discouraging certain actions using regulatory charges to achieve compliance. See *South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (imposition of a 50-cent deduction on proceeds of all milk sold commercially is constitutional where "the clear language and structure of the [statute] indicates that its primary purpose is regulation" and the "purpose is to reduce overproduction of milk and shift some of the financial burden of the price support system."). Likewise, it is beyond dispute that Congress may raise money to recover the expenses of a

regulatory program. See, e.g., *New Orleans*, 874 F.2d at 1021-22 ("Courts have consistently held that ships may be made to pay for services they get.").

It is, however, also beyond dispute that Congress cannot merely impose a direct economic burden on merchandise for export in the absence of regulation. See *IBM*, 116 S. Ct. at 1798-99 (rejecting the government's argument that the Commerce, Import-Export and Export Clauses should be read in harmony to permit the imposition of generally applicable, non-discriminatory taxes on exports). That is the case here. The government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears that the HMT regulates nothing. It is not designed to reduce the overall use of the ports. See *Block*, 717 F.2d at 887. Rather, the HMT merely increases the cost of exporting by raising money to maintain the harbors in a manner that is not reasonably connected to the exporter's use of the harbors, and is therefore unconstitutional. Additionally, the government has not persuaded us that the HMT is designed to simply recoup the costs of the services, e.g., port maintenance, provided by the government because the sums paid by the exporter have no reasonable relationship to the cost or the value of the services received by the exporters, and the exporters are not even the direct beneficiaries of the services. Moreover, the mere fact that Congress may have attempted to exert its power under the Commerce Clause, as opposed to the Tax Clause, as evidenced by the fact that the HMT is not designed to raise money for the general welfare, is not dispositive. See *Moon v. Freeman*, 379 F.2d 382, 390-91 (9th Cir. 1967) (stating that the "test for determining when a monetary imposition nominally imposed under the commerce power should be considered an exercise of the power to raise revenue and therefore [be] barred by the export clause" is "to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution."). The HMT, in fact, does not regulate or facilitate

commerce and is, in effect, a tax. Therefore, as to exporters at least, the HMT is not an appropriate use of Congress' power to facilitate and regulate commerce.

New Orleans is distinguishable because there the fees were not assessed based on the value of the goods but were based on the benefit of services such as pilotage, towage and wharfage as measured by the size or weight of a vessel and paid by those benefiting from the service. 874 F.2d at 1020 (fees based on the number of days in port, the length of the vessel, and whether the ships load or unload cargo). Thus, the fees were based on the services received during port use. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 80 L. Ed. 215, 56 S. Ct. 194 (1935), also relied on by the government, is similarly distinguishable. There, the State Docks Commission, a state agency, imposed a fee on all vessels of a certain size that entered the port and vessel operators alleged that the fee violated the constitutional provision prohibiting imposition of duties of tonnage by states. *Id.* at 262-63. The fee was designed to reimburse the agency for the costs of policing the harbor. *Id.* at 264. There, however, the parties agreed that the fee was reasonable. *Id.* at 263. Here, the parties have not reached any such agreement, and, as we conclude above, the fee is not reasonable. Moreover, there the vessel operators -- the direct beneficiaries of the agency's policing actions -- paid the fee. *Id.* Furthermore, all such operators received the benefits for which they paid. *Id.* at 266 ("It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations, such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it."). Finally, the statute at question in that case also had a regulatory effect "plainly devised to insure the safety of vessels and to facilitate their use of the harbor." *Id.* at 264. Here, there is no such effect. The HMT does not ensure vessel safety, but was designed to cover the costs of dredging the harbors. See S. Rep. No. 99-126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647.

Finally, certain of the amici, given leave to file briefs here, argue that, because the HMT is unconstitutional and therefore void ab initio, all monies collected since the implementation of the HMT should be refunded. As US Shoe does not seek such recovery, there is no need for us to reach this issue. Similarly, we do not reach the issue of whether the HMT violates the Port Preference Clause because it is not necessary to our disposition of this appeal.

CONCLUSION

We conclude that the trial court properly exercised jurisdiction pursuant to 28 U.S.C. § 1581(i). Because Customs merely receives the funds from the exporters and transfers the funds to the Trust Fund without exercising any discretion, performing any analysis, calculating any amounts or issuing any decision or order, there was no Customs' "decision" for US Shoe to protest, and jurisdiction therefore could not be proper under 28 U.S.C. § 1581(a). Moreover, because the HMT is a tax, as opposed to a user fee, directly imposed on goods in export transit, we conclude that the HMT statute, as applied to exports, violates the Export Clause and is therefore invalid to the extent it applies to exports. Therefore, the trial court properly (1) granted summary judgment that the HMT statute was unconstitutional, (2) enjoined the government from collecting further HMT on exports, and (3) ordered it to refund the HMT amounts paid by US Shoe for the period assessed in the complaint. Accordingly, the judgment of the Court of International Trade is

AFFIRMED.

DISSENT BY:

MAYER

DISSENT:

MAYER, Circuit Judge, dissenting.

Because in my view the Harbor Maintenance Tax (HMT) is a user fee, it does not violate the Export Clause of the Constitution.

Statutes are presumed constitutional. *Fairbank v. United States*, 181 U.S. 283, 285, 45 L. Ed. 862, 21 S. Ct. 648 (1901). We must "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). Indeed, courts must strive to avoid constitutional questions. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979) (courts are required to choose any reasonable construction of a statute that would eliminate the need to confront a contested constitutional issue); *Hooper v. California*, 155 U.S. 648, 657, 39 L. Ed. 297, 15 S. Ct. 207 (1895) (courts must resort to "every reasonable construction ... in order to save a statute from unconstitutionality"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

In light of these mandates, the question is whether the HMT is a tax or duty within the proscription of the Export Clause or whether it is a permissible user fee. Generally, a tax is enacted to raise revenue "to go to the general support of the govern-

ment," see *Head Money Cases*, 112 U.S. 580, 596, 28 L. Ed. 798, 5 S. Ct. 247 (1884), while a user fee is designed as a specific charge for the use of government facilities and services, see *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621, 69 L. Ed. 2d 884, 101 S. Ct. 2946 (1981). If it is the latter, we avoid the sticky question whether the assessment violates the Export Clause. So, we must construe the HMT as a user fee, if reasonable to do so, unless it is "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

Congress thought it was enacting a user fee. It is true that the statute calls the HMT a tax and that it resides in the Internal Revenue Code. It is equally true, however, that the HMT is levied on "port use." The label is not dispositive; we must dig deeper. See *Head Money Cases*, 112 U.S. at 595-96 ("The act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."); *Pace v. Burgess*, 92 U.S. 372, 375, 23 L. Ed. 657 (1875); see also *Fairbank*, 181 U.S. at 304 (courts analyze things, not names).

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." See *Crandon v. United States*, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 (1990). The object and policy of the HMT help to reveal its true identity. The Senate Report states: "The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels. The provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage."[1] S. Rep. No. 99-126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644. The House Report similarly

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[1]Charges for harbor services like pilotage, wharfage, and dockage are permissible. See generally *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 80 L. Ed. 215, 56 S. Ct. 194 (1935).

states that the HMT is "a charge on use by a commercial vessel of a harbor or channel ('port') in the United States for the loading or unloading of commercial cargo on or from the vessel." H.R. Rep. No. 99-228, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6706 (emphasis added). In fact, the legislative history refers repeatedly to the HMT as being based on use. See, e.g., *id.* at 1, *reprinted in* 1986 U.S.C.C.A.N. at 6706 ("Harbor (Port) User Charges"); H.R. Conf. Rep. No. 99-1013, at 228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723, 6740 ("Port Use Tax"); S. Rep. No. 99-126, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 ("user taxes"); *id.* at 135, *reprinted in* 1986 U.S.C.C.A.N. at 6705 (additional views of Sen. Lautenberg) ("user fee").

Moreover, the HMT was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (Act), "comprehensive" legislation that addressed myriad problems in the federal water resources development program. See S. Rep. No. 99-126, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6641. "Historically, the Federal Government had financed the full cost of designing, constructing, rehabilitating, maintaining, and operating the ... coastal harbors of the United States." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6643-44. Yet, the law did not "impose Federal user fees or charges on the beneficiaries of these expenditures." H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709. Congress found that traditional harbor maintenance policy would "not meet national needs" because it was "unlikely that the Federal Government [would] finance the construction of such port improvements." S. Rep. No. 99-126, at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6646. As the House Report explains: "Additional Federal investment is needed for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce. Such additional investment in U.S. ports will facilitate economic development and make the Nation's water transportation

system more efficient." H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709.

Importantly, Congress found that these needs were "clearly commercial." S. Rep. No. 99-126, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added). It decided "that a portion of Federal expenditures needed for port operations and maintenance should be borne by the direct beneficiaries of such expenditures," commercial users. H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709 (emphasis added). Congress targeted commercial users to help shoulder the fiscal burden of operations and maintenance costs for harbors and inland waterways because they are the parties who enjoy their benefits. The government "has an obvious interest in making those who specifically benefit from its services pay the cost." *Massachusetts v. United States*, 435 U.S. 444, 462, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978).

One of Congress' primary difficulties, however, was deciding how to craft a user fee to "help defray the costs of maintaining new harbors deeper than 45 feet."[2] S. Rep. No. 99-126, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6647. "In recent years, the Committee considered a variety of proposals involving harbor maintenance. These ranged from diverting a portion of customs revenues for harbor work to port-by-port maintenance fees to more studies. The debate in some cases is between high maintenance harbors and low maintenance harbors; in others it is between large ports and small ports; or between bulk cargo

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[2] Very few bays and estuaries have natural depths greater than 20 feet. S. Rep. No. 99-126, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Yet the size of vessels has so increased that harbors forty-five feet deep are now "inadequate for many fully loaded tankers." Id. at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Congress found that the constraints of these shallow harbors "add to the costs of importing crude oil and petroleum products," and that "deeper draft harbors would facilitate the export of U.S. coal and, eventually, other bulk commodities, such as grain and ores." *Id.*

and containerized cargo ports." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646. In fact, the Senate Subcommittee on Water Resources held twenty-six hearings over three Congresses and more than four years on the Act. *Id.* at 116, *reprinted in* 1986 U.S.C.C.A.N. at 6688. Ultimately, it opted to impose a nationally-uniform fee on the "value of the cargo passing through harbors." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646; see also *id.* at 111-12, *reprinted in* 1986 U.S.C.C.A.N. at 6684. The House Report explains that "the ad valorem basis of the charges is the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710.

Critically, Congress mandated that fees collected from the HMT be used only for commercial navigation projects. [3]Monies in the Harbor Maintenance Trust Fund (HMTF) may be used only to pay (1) for the operations and maintenance costs of the United States portion of the St. Lawrence Seaway, and for the eligible operations and maintenance costs "assigned to commercial navigation of all harbors and inland harbors within the United States," 33 U.S.C. § 2238(a) (1994) (emphasis added), referenced in 26 U.S.C. § 9505(c)(1) (1994); and (2) for all of the expenses of administering the HMT incurred by the Departments of Treasury and Commerce and the U.S. Army Corps of Engineers, up to $ 5,000,000 per fiscal year, 26 U.S.C. § 9505(c)(3).[4] So, HMT charges, collected from com-

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[3] Interest earned on monies in the Harbor Maintenance Trust Fund (HMTF) also remains in the fund.

[4] 26 U.S.C. § 9505(c)(2) permits monies in the fund to be used to pay rebates of tolls or charges levied for use of the St. Lawrence Seaway, as required by 33 U.S.C. § 988a. Section 988a was amended in 1994, however, to waive the collection of tolls or charges on commercial vessels, instead of requiring commercial users to pay the

mercial users, may only be expended for harbor operations and maintenance costs incurred on their behalf.

The government has been true to this constraint. In its initial report to Congress on the HMTF's status, the government explained that operations and maintenance costs for commercial navigation were accounted for in the "Corps of Engineers Management Information System." First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1987 - 1992 at 2, P 6 [hereinafter First Report]. In deciding which expenditures were reimbursable, the government recognized that some projects have both a "commercial navigation" purpose and some other purpose, such as recreation, hydropower, or flood control. *Id.* at 3, P 7. All operations and maintenance expenditures made for single purpose commercial navigation projects were considered subject to reimbursement from the HMTF. *Id.* In contrast, on joint purpose projects, the government allocated costs to the project's different purposes in proportion to the benefits realized for each purpose, recovering only the commercial navigation costs. *Id.*; see also Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993 at 1-2, P 4 (indicating continued compliance) [hereinafter Second Report]. This ensures that HMT funds collected from commercial users are spent for their benefit.

In sum, it surely does not violate Congress' intent to construe the HMT as a user fee. The question is whether it is reasonable to interpret it that way. In analyzing whether a particular charge constitutes a user fee, the Court has asked whether it: (1) discriminates against the constitutionally-protected interest; (2) is based on some fair approximation of the use of some system; and (3) is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred.

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toll or charge and then obtain a rebate. Pub. L. No. 103-331, § 339(a), 108 Stat. 2496.

Massachusetts, 435 U.S. at 464; *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972).

First, the HMT does not discriminate against exporters. Indeed, the trial court did not hold to the contrary; it simply bypassed the issue and ruled the HMT a tax based on the second and third prongs of the Massachusetts test. The HMT is levied against commercial users of United States ports and harbors, including exporters, importers, domestic shippers, and passenger carriers (except ferries, as defined). Congress found these groups to be the principal beneficiaries of harbor operations and maintenance projects. It also required that HMT monies be expended only for their benefit. That the statute exempts some harbor users from payment does not render the HMT discriminatory against exporters. Some exempted users, like recreational users, do not and would not benefit from operations and maintenance projects funded by the HMT because those projects are commercial in nature. Requiring such users to pay the fee would be unfair. Congress made reasonable policy decisions to exempt other users, such as nonprofit organizations transporting humanitarian and development assistance cargo. 26 U.S.C. § 4462(h); see also *id.* § 4462(b) (exempting cargo transported within Alaska, Hawaii, or any United States possession, or between those locales and the United States mainland "because of the high dependence of these islands' economies on waterborne commerce." H.R. Rep. No. 99-228, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6710). These exemptions do not compromise the HMT's non-discriminatory status.

Second, the HMT is based on a fair, if imperfect, approximation of exporters' use of, or privilege to use, United States harbors and ports. When the government "applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system." *United States v. Sperry Corp.*, 493 U.S. 52, 61, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989). "Perfect uniformity and perfect equality of taxation, in all the respects in which the human mind can view

it, is a baseless dream." *Head Money Cases*, 112 U.S. at 595. Consequently, the amount of a user fee need not be "precisely calibrated to the use that a party makes of Government services." *Sperry*, 493 U.S. at 60.

The government concedes that the HMT, like most user fees, is imperfect, but contends that it is a fair approximation of use. U.S. Shoe argues, and the court held, that this is wrong for four primary reasons: (1) all harbor users do not pay the fee, (2) there is no correlation between the charges collected at a particular port and expenditures for that port's maintenance and operations, (3) low-value, bulk cargo importers and exporters use the port facilities to a greater extent than high-value, non-bulk cargo importers and exporters yet pay lower fees, and (4) the ad valorem nature of the fee does not accurately measure use. The first three, of course, are the precise concerns with which the legislature wrestled over three Congresses and more than four years. The fourth challenge is to what Congress found to be "the only acceptable basis on which to impose such charges" because it was "uniform" and "minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710. "This was obviously the judgment of Congress and we [should] abide by it." *Sperry*, 493 U.S. at 62. Notwithstanding, I address each issue in turn.

For the same reasons that the HMT is not discriminatory, the fact that all users of our harbors and ports do not pay the fee does not mean it is an unfair approximation of use by those against whom the assessment is levied. See *Evansville*, 405 U.S. at 717-18 (upholding a user fee as a fair approximation of the use of the facilities for whose benefit they are imposed even though "a majority of the actual number of persons who use facilities of the airports involved" were exempt, because the exemptions were not "wholly unreasonable"). Nor is there merit to U.S. Shoe's second argument that because fees collected at a particular port are not necessarily expended for op-

erations and maintenance at that port, the fee is not a fair measure of use. This is an overly narrow view. Users do not benefit only from access to the particular ports they use. Every exporter has all ports and harbors available to it. Those that never use certain ports benefit from them "in the sense that [they] are available for their use if needed and in that" the provision of better harbor maintenance services "makes the [ports] safer for all users." *Massachusetts*, 435 U.S. at 468; see also *Sperry*, 493 U.S. at 63.

Finally, U.S. Shoe's related third and fourth arguments do not establish that the HMT is not a fair approximation of use. Initially, there is great irony in the argument that the charge is unfair because high-value, non-bulk cargo carriers are assessed higher fees than low-value, bulk cargo shippers, yet allegedly "use" harbors to a lesser extent. Exporters generally ship low-value cargo, such as grain and coal, which is transported in bulk. See First Report at 3, P 9. Importers, on the other hand, tend to ship high-value cargo, like electronics and automobiles, which is not shipped in bulk. *Id.* Consequently, exporters are generally assessed lower fees than importers, yet they purportedly "use" the harbors to a greater extent because of the bulk nature of their shipments. Thus, it is the exporters themselves who allegedly are not bearing their fair share.

In addition to the irony, U.S. Shoe's argument is unpersuasive. First, not all bulk cargo is of low value, nor, undoubtedly, is all non-bulk cargo of high value. For example, some "high value" commodities, such as "petroleum," are transported in bulk. *Id.* Thus, to say that the HMT is unfair because low-value cargo carriers use ports to a greater extent than high-value cargo carriers is not wholly accurate. Second, even if a high-value cargo shipper never requires the use of harbors deeper than forty-five feet, there is nothing in the record to support the notion that the only operations and maintenance projects undertaken with HMTF monies are deep-harbor dredging. Indeed, U.S. Shoe does not argue that projects financed with HMTF monies are so limited. While projects are limited to those that

inure to the benefit of commercial users, the government has discretion to decide which projects those are. That some users, like exporters, transport some bulk products of lower value than some non-bulk products transported by other users, does not make the HMT a tax. Nor does its ad valorem structure.

It is beyond dispute that an ad valorem charge can be a user fee. See *Sperry*, 493 U.S. at 59-64; *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990); see also *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992). Notwithstanding, U.S. Shoe attempts to distinguish *Sperry* and *Alamo* on the ground that the parties assessed the user fees in those cases were direct beneficiaries of the provided services. Here, it argues, the direct beneficiaries are the vessel owners, not the importers and exporters who pay the fee. There are two problems with this argument. First, it flies in the face of Congress' finding that exporters are the direct beneficiaries. Congress decided that a portion of federal expenditures needed for port operations and maintenance should be borne by the direct beneficiaries of such expenditures, among whom it obviously included exporters and importers. Second, the Court rejected a similar argument in *Evansville*. There, it held that it is not "particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses." 405 U.S. at 714. Similarly, here it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses.

Finally, the HMT is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. The relevant inquiry is whether Congress structured the HMT so that the monies collected under it are "fairly apportioned" to the government's cost of providing commercial harbor maintenance services. U.S. Shoe argues, and the trial court held, that the HMT fails this prong for two primary reasons: (1)

it funds projects yet to be commenced rather than reimbursing the government for completed projects, and (2) the HMTF has accumulated a large surplus. The first objection is misplaced; the second, while troubling, is unavailing.

Regardless of the factual accuracy of U.S. Shoe's first concern,[5] when viewed in light of the purposes for which the HMT was enacted, it is of little relevance that HMT monies might fund port operations and maintenance projects not completed, or even initiated, at the time of collection. The HMT is not a short-term fix to the myriad problems that plague our nation's waterborne commerce. It is a long-term vehicle to improve and to maintain the harbors for the continuing benefit of United States commerce. Indeed, Congress expressly found that the fee will facilitate economic development. "[A] surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years." *Massachusetts*, 435 U.S. at 470 n.25 (emphasis added). The Eleventh Circuit has also recognized that user fees may be expended on future projects. In *Alamo*, it held that "given the long term nature of maintaining and developing an airport, it was appropriate ... to factor in future development plans when setting user fees." 906 F.2d at 522. Thus, it is of little moment that HMT monies are purportedly expended to fund projects not yet started rather than to repay the government for services that have already been rendered.

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[5] The First Report states that "the actual transfer of funds from the [HMTF] is for expenditures made in the previous fiscal year. In other words, FY 1990 expenditures are shown as transfers from the [HMTF] in FY 1991, and so forth. Corps expenditures are never made directly from the [HMTF], nor are transfers made on the basis of estimates or projections." First Report at 3, P 7. This indicates that FY 19xx projects are reimbursed from the HMTF with FY 19xx, or perhaps surplus, funds in FY 19xx+1.

Similarly, the fact that the HMTF enjoys, or perhaps suffers, a large surplus does not resolve whether Congress structured the HMT as a tax or a user fee. To be sure, the substantial surplus weighs against finding the HMT a user fee. But this does not, of itself, render it a tax. A closer look reveals that the HMT's structure was not ill-conceived. From 1987 through 1990, during which the HMT was only 0.04% ad valorem and paid just 40% of eligible Corps costs, revenues and expenditures were closely aligned. See First Report at 6, P 13. For example, in FY 1988, HMTF expenditures actually exceeded revenues by approximately $ 6 million, and the ending balance was just $ 9 million. *Id.*

Trouble began in 1991, when Congress increased the ad valorem rate to 0.125% in order to fund 100% of eligible Corps expenses and to reimburse the National Oceanic and Atmospheric Administration (NOAA) $ 45.5 million for its annual commercial navigation costs. While the revenue generated under the higher rate was only slightly less than projected, expenditures were considerably less, resulting in a growing HMTF surplus. Withdrawals from the HMTF were less than anticipated due primarily to (1) the absence of legislation authorizing NOAA to receive its commercial navigation costs, (2) the fact that the Corps' operations and maintenance budget was lower than had been projected in 1990 when the new ad valorem rate was established, and (3) withdrawals from the HMTF for improved administration and enforcement, while authorized, remained unappropriated. See, e.g., Second Report at 5, P 10.

The surplus has certainly burgeoned in recent years as a result of these unforeseen decreases in projected expenditures, but that does not mean that the HMT's structure shows it to be a tax. Congress is not prescient. In fact, the government recognizes that this is a problem about which something must be done. See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994 at 7, P 16 ("The growing surplus in the HMTF remains. This can only be corrected by widening the authorized uses for HMTF monies,

or by reducing the HMF [sic] to a level consistent with its annual expenditures."). Congress has already amended the HMT statute once. There is no reason to believe that it will not correct the growing surplus. Until then, commercial users know that all HMT monies plus interest may only be expended for harbor operations and maintenance projects with commercial purposes. They may not be used for the general support of the government. See *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 371-72, 127 L. Ed. 2d 183, 114 S. Ct. 855 (1994) (declining to decide whether an airport user fee, which had accumulated "huge surpluses," was excessive under *Evansville*, in part because all fees collected had to be expended for the airport's capital or operating costs, and the airlines challenging the fee had not suggested that the surplus was being used for any purpose other than airport-related expenses); *Head Money Cases*, 112 U.S. at 596 (charges imposed on shipowners for each immigrant they brought into the United States, which were deposited into an "immigrant fund" appropriated in advance for the temporary care of passengers whom shipowners transported, was not a tax).

I would reverse the judgment of the Court of International Trade.

UNITED STATES,
PETITIONER
v.
UNITED STATES SHOE CORPORATION

No. 97-372

SUPREME COURT OF THE UNITED STATES

523 U.S. 360; 118 S. Ct. 1290; 140 L. Ed. 2d 453; 1998 U.S. LEXIS 2300; 66 U.S.L.W. 4251; 98-1 U.S. Tax Cas. (CCH) P45,325; 81 A.F.T.R.2d (RIA) 1256; 98 Cal. Daily Op. Service 2336; 98 Daily Journal DAR 3171; 11 Fla. L. Weekly Fed. S 429

March 4, 1998, Argued

March 31, 1998, Decided

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

DISPOSITION:

114 F.3d 1564, affirmed.

JUSTICE GINSBURG delivered the opinion of the Court.

The Export Clause of the Constitution states: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const., Art. I, § 9, cl. 5. We held in *United States v. International Business Machines Corp.* (*IBM*), 517 U.S. 843, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) that the Export Clause categorically bars Congress from imposing any tax on exports. The Clause, however, does not rule out a "user fee," provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services, facilities, or benefits. See *Pace v. Burgess*, 92 U.S. 372, 375-376, 23 L. Ed. 657 (1876). This case presents the question whether the Harbor Maintenance Tax (HMT), 26 U.S.C. § 4461(a), as applied to goods loaded at United States ports for export, is an impermissible tax on exports or, instead, a legitimate user fee. We hold, in accord with the Federal Circuit, that the tax, which is imposed on an ad valorem basis, is not a fair approximation of services, facilities, or benefits furnished to the exporters, and therefore does not qualify as a permissible user fee.

I.

The HMT, enacted as part of the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461-4462, imposes a uniform charge on shipments of commercial cargo through the Nation's ports. The charge is currently set at 0.125 percent of the cargo's value. Exporters, importers, and domestic shippers are liable for the HMT, § 4461(c)(1), which is imposed at the time of loading for exports and unloading for other shipments, § 4461(c)(2). The HMT is collected by the Customs Service and deposited in the Harbor Maintenance Trust Fund (Fund). Congress may appropriate amounts from the Fund to pay for harbor maintenance and development projects, including costs associated with the St. Lawrence Seaway, or related expenses. § 9505.

Respondent United States Shoe Corporation (U.S. Shoe) paid the HMT for articles the company exported during the pe-

riod April to June 1994 and then filed a protest with the Customs Service alleging the unconstitutionality of the toll to the extent it applies to exports. The Customs Service responded with a form letter stating that the HMT is a statutorily mandated fee assessment on port users, not an unconstitutional tax on exports. On November 3, 1994, U.S. Shoe brought this action against the Government in the Court of International Trade (CIT). The company sought a refund on the ground that the HMT is unconstitutional as applied to exports.

Sitting as a three-judge court, the CIT held that its jurisdiction was properly invoked under 28 U.S.C. § 1581(i); on the merits, the CIT agreed with U.S. Shoe that the HMT qualifies as a tax. 907 F. Supp. 408 (1995). Rejecting the Government's characterization of the HMT as a user fee rather than a tax, the CIT reasoned: "The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo .... Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported." *Id.*, at 418. Relying on the Export Clause, the CIT entered summary judgment for U.S. Shoe.

The Court of Appeals for the Federal Circuit, sitting as a five-judge panel, affirmed. 114 F.3d 1564 (1997). On auxiliary questions, the Federal Circuit upheld the CIT's exercise of jurisdiction under § 1581(i) and agreed with the lower court that the HMT applied to goods in export transit.[1] Concluding that the HMT is not based on a fair approximation of port use, the Federal Circuit also agreed that the HMT imposes a tax, not a user fee. In making this determination, the Court of Appeals emphasized that the HMT does not depend on the amount or manner of port use, but is determined solely by the value of cargo. Judge Mayer dissented; in his view, Congress properly designed the HMT as a user fee, a toll on shippers that supplies

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[1]The Government does not here challenge the determination that the HMT applies to goods in export transit.

funds not for the general support of government, but exclusively for the facilitation of commercial navigation.

Numerous cases challenging the constitutionality of the HMT as applied to exports are currently pending in the Court of International Trade and the Court of Federal Claims.[2] We granted certiorari, 522 U.S. (1997), to review the Federal Circuit's determination that the HMT violates the Export Clause.

II.

As an initial matter, we conclude that the CIT properly entertained jurisdiction in this case. The complaint alleged exclusive original jurisdiction in that tribunal under 28 U.S.C. § 1581(a) or, alternatively, § 1581(i). App. 26. We agree with the CIT and the Federal Circuit that § 1581(i) is the applicable jurisdictional prescription. The key directive is stated in 26 U.S.C. § 4462(f)(2), which instructs that for jurisdictional purposes, the HMT "shall be treated as if such tax were a customs duty."

Section 1581(a) surely concerns customs duties. It confers exclusive original jurisdiction on the Court of International Trade in "any civil action commenced to contest the [Customs Service's] denial of a protest." A protest, as indicated in 19 U.S.C. § 1514, is an essential prerequisite when one challenges an actual Customs decision. As to the HMT, however, the Federal Circuit correctly noted that protests are not pivotal, for Customs "performs no active role," it undertakes "no analysis [or adjudication]," "issues no directives," "imposes no liabilities"; instead, Customs "merely passively collects" HMT payments. 114 F.3d at 1569.

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[2]According to the Government, some 4,000 case raising this claim are currently stayed in the CIT, with more than 100 additional cases stayed in the Court of Federal Claims. See Brief for United States 4.

Section 1581(i) describes the Court of International Trade's residual jurisdiction over

> "any civil action commenced against the United States ... that arises out of any law of the United States providing for --
>
> "(1) revenue from imports or tonnage;
>
> "(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection. ..."

This dispute, as the Federal Circuit stated, "involves the administration and enforcement' of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports." 114 F.3d at 1571. True, § 1581(i) does not use the word "exports." But that is hardly surprising in view of the Export Clause, which confines customs duties to imports. Revenue from imports and revenue from customs duties are thus synonymous in this setting. In short, as the CIT correctly concluded and the Federal Circuit correctly affirmed, "Congress [in § 4462(f)(2)] directed [that] the [HMT] be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within [§]1581(i)(1)." 907 F. Supp. at 421. Accordingly, CIT jurisdiction over controversies regarding the administration and enforcement of the HMT accords with § 1581(i)(4).[3]

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[3] Because we determine that the Court of International Trade has exclusive jurisdiction over challenges to the HMT under § 1581(i)(4), it follows that the Court of Federal Claims lacks jurisdiction over the challenges to the HMT currently pending there. See 28 U.S.C. § 1491(b). The plaintiffs in these challenges may invoke § 1631, which authorizes inter-court transfers, when "in the interest of justice," to cure want of jurisdiction. See also § 610 (as used in Title 28, the term "court" includes the Court of Federal Claims and the CIT)

III.

Two Terms ago, in *IBM*, this Court considered the question whether a tax on insurance premiums paid to protect exports against loss violated the Export Clause. Distinguishing case law developed under the Commerce Clause, 517 U.S. at 850-852, and the Import-Export Clause, 517 U.S. at 857-861, the Court held that the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit. Before this Court's decision in *IBM*, the Government argued that the HMT, even if characterized as a "tax" rather than a "user fee," should survive constitutional review "because it applies without discrimination to exports, imports and domestic commerce alike." Reply Brief for United States 9, n. 2. Recognizing that *IBM* "rejected an indistinguishable contention," the Government now asserts only that HMT is "'a permissible user fee,'" *ibid.*, a toll within the tolerance of Export Clause precedent. Adhering to the Court's reasoning in *IBM*, we reject the Government's current position.

The HMT bears the indicia of a tax. Congress expressly described it as "a *tax* on any port use," 26 U.S.C. § 4461(a) (emphasis added), and codified the HMT as part of the Internal Revenue Code. In like vein, Congress provided that, for administrative, enforcement, and jurisdictional purposes, the HMT should be treated "as if [it] were a customs duty." §§ 4462(f)(1),(2). However, "we must regard things rather than names," *Pace v. Burgess*, 92 U.S. at 376, in determining whether an imposition on exports ranks as a tax. The crucial question is whether the HMT is a tax on exports in operation as well as nomenclature or whether, despite the label Congress has put on it, the exaction is instead a bona fide user fee.

In arguing that the HMT constitutes a user fee, the Government relies on our decisions in *United States v. Sperry Corp.*, 493 U.S. 52, 107 L. Ed. 2d 290, 110 S. Ct. 387 (1989), *Massachusetts v. United States*, 435 U.S. 444, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978), and *Evansville-Vanderburgh Air-*

port Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 31 L. Ed. 2d 620, 92 S. Ct. 1349 (1972). In those cases, this Court upheld flat and ad valorem charges as valid user fees. See *United States v. Sperry Corp.*, 493 U.S. at 62 (1 1/2 percent ad valorem fee applied to awards certified by the Iran-United States Claims Tribunal qualifies as a user fee and is not so excessive as to violate the Takings Clause); *Massachusetts v. United States*, 435 U.S. at 463-467 (flat federal registration fee imposed annually on all civil aircraft meets genuine user fee standards and, as applied to state-owned aircraft, does not dishonor State's immunity from federal taxation); *Evansville-Vanderburgh Airport Authority*, 405 U.S. at 717-721 (flat charge for each passenger enplaning, levied for the maintenance of State's airport facilities, does not run afoul of the dormant Commerce Clause). Those decisions involved constitutional provisions other than the Export Clause, however, and thus do not govern here.

IBM plainly stated that the Export Clause's simple, direct, unqualified prohibition on any taxes or duties distinguishes it from other constitutional limitations on governmental taxing authority. The Court there emphasized that the "text of the Export Clause ... expressly prohibits Congress from laying any tax or duty on exports." 517 U.S. at 852; see also *id.*, at 861 ("The Framers sought to alleviate ... concerns [that Northern States would tax exports to the disadvantage of Southern States] by completely denying to Congress the power to tax exports at all."). Accordingly, the Court reasoned in *IBM*, "our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid." 517 U.S. at 851; see also 517 U.S. at 857 ("We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence. ... Meaningful textual differences exist [between the two Clauses] and should not be overlooked."). In *Sperry*, moreover, we noted that the Takings

Clause imposes fewer constraints on user fees than does the dormant Commerce Clause. See 493 U.S. at 61, n. 7 (analysis under Takings Clause is less "exacting" than under the dormant Commerce Clause). *A fortiori*, therefore, the Takings Clause is less restrictive than the Export Clause.

The guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context remains our time-tested decision in *Pace*. *Pace* involved a federal excise tax on tobacco. Congress provided that the tax would not apply to tobacco intended for export. To prevent fraud, however, Congress required that tobacco the manufacturer planned to export carry a stamp indicating that intention. Each stamp cost 25 cents (later 10 cents) per package of tobacco. Congress did not limit the quantity or value of the tobacco packaged for export or the size of the stamped package; "these were unlimited, except by the description of the exporter or the convenience of handling." 92 U.S. at 375.

The Court upheld the charge, concluding that it was "in no sense a duty on exportation," but rather "compensation given for services [in fact] rendered." *Ibid.* In so ruling, the Court emphasized two characteristics of the charge: It "bore no proportion whatever to the quantity or value of the package on which [the stamp] was affixed"; and the fee was not excessive, taking into account the cost of arrangements needed both "to give to the exporter the benefit of exemption from taxation, and ... to secure ... against the perpetration of fraud." *Ibid.*

Pace establishes that, under the Export Clause, the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here. Unlike the stamp charge in *Pace*, the HMT is determined entirely on an ad valorem basis. The value of export cargo, however, does not correlate reliably with the federal harbor services used or usable by the exporter. As the Federal Circuit noted, the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time

it spends in port, and the services it requires, for instance, harbor dredging. See 114 F.3d at 1572.

In sum, if we are "to guard against ... the imposition of a [tax] under the pretext of fixing a fee," *Pace v. Burgess*, 92 U.S. at 376, and resist erosion of the Court's decision in *IBM*, we must hold that the HMT violates the Export Clause as applied to exports. This does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance. It does mean, however, that such a fee must fairly match the exporters' use of port services and facilities.

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For the foregoing reasons, the judgment of the Court of Appeals for the Federal Circuit is

Affirmed.

UNITED STATES SHOE CORPORATION,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

Court No. 94-11-00668

UNITED STATES COURT OF INTERNATIONAL TRADE

22 C.I.T. 613; 1998 Ct. Intl. Trade LEXIS 76; SLIP OP. 98-88

June 26, 1998, Dated

DISPOSITION:

Slip Op. 96-32 readopted as the opinion of the court on the issue of interest.

JUDGES:

BEFORE: HON. JANE A. RESTANI, JUDGE.

OPINION BY:

JANE A. RESTANI

OPINION:

JUDGMENT

Upon consideration of Plaintiff's Motion for an Order Settling Interest and Costs, defendant's response thereto, and all other proceedings had herein; and

WHEREAS, a three-judge panel of this Court entered a judgment for plaintiff on December 4, 1995, declaring the Harbor Maintenance Tax as imposed upon merchandise exported from the United States to be unconstitutional, enjoining the United States Customs Service from the assessment and collection of the Harbor Maintenance Tax in connection with merchandise exported from the United States, and awarding plaintiff a money judgment in the amount of $8,281.87, together with interest and costs as provided by law; and

WHEREAS this Court determined in Slip Op. 96-32 (February 7, 1996) that plaintiff is entitled to interest on the money judgment awarded in this case, pursuant to 28 U.S.C. § 2411; and

WHEREAS at the time the Court issued Slip Op. 96-32, the Government already had noticed an appeal of this case on February 1, 1996, and Slip Op. 96-32 specifically notes that "notice of appeal has been filed and the court lacks jurisdiction to alter the judgment;" and

WHEREAS the December 4, 1995 judgment of the Court in this case was affirmed by the United States Court of Appeals for the Federal Circuit on June 3, 1997, in *United States Shoe Corp.* v. *United States*, 114 F.3d 1564 (Fed. Cir. 1997); and

WHEREAS the decision of the United States Court of Appeals for the Federal Circuit in United States Shoe Corp. v. United States was affirmed by the Supreme Court of the United States on March 31, 1998, in *United States v. United States*

Shoe Corp., 140 L. Ed. 2d 453, 118 S. Ct. 1290 (1988), which decision is now final; and

WHEREAS the stay of execution of the money judgment awarded to plaintiff and the effect of the declaratory and injunctive relief, ordered by the Court on December 4, 1995, by its terms automatically dissolved upon "the conclusion of any appellate proceedings"; and

WHEREAS defendant expressly reserves any right remaining to appeal the award of interest or any costs in this case;

WHEREAS, the court has previously determined that costs shall be awarded as provided by law, the court has discretion to award costs, and plaintiff pursued diligently this test case of minor principal value; it is hereby

(1) ORDERED that further briefing is not required and Slip Op. 96-32 is hereby readopted as the opinion of the court on the issue of interest.

(2) ORDERED that defendant pay plaintiff the principal amount owing of $ 8,281.87 within 60 days hereof;

(3) ORDERED that defendant pay plaintiff $ 403.63 in costs within 60 days hereof;

(4) ORDERED that defendant pay plaintiff interest on the aforementioned $ 8,821.87 principal, calculated under 28 U.S.C. § 2411, and that the payment obligation is stayed until 30 days after the time for appeal expires or appellate proceedings are complete.

Jane A. Restani

JUDGE

Dated: New York, New York

This 26th day of June, 1998.

UNITED STATES SHOE CORPORATION,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

98-1574

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2002 U.S. App. LEXIS 23176

October 22, 2002, Decided

October 22, 2002, Filed

PRIOR HISTORY:

United States Shoe Corp. v. United States, 296 F.3d 1378, 2002 U.S. App. LEXIS 14776 (Fed. Cir. 2002)

OPINION:

ORDER

A petition for rehearing en banc having been filed by the APPELLEE, and the response thereto having been invited by the court and filed by the APPELLANT *, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 29, 2002.

* Arbon Steel & Service Co., Inc. filed an amicus curiae brief.

Dated: October 22, 2002

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Plaintiff-Appellee,
v.
UNITED STATES,
Defendant-Appellant.

98-1590

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

201 F.3d 1367; 2000 U.S. App. LEXIS 681; 2000-1 U.S. Tax Cas. (CCH) P70,134; 85 A.F.T.R.2d (RIA) 518

January 19, 2000, Decided

SUBSEQUENT HISTORY:

As Corrected February 2, 2000. As Amended May 8, 2000. Rehearing and Rehearing En Banc Denied May 31, 2000, Reported at: *2000 U.S. App. LEXIS 15299*. Court Correction of June 9, 2000 Received after F. 3d Cite Availability. Reported at: *2000 U.S. App. LEXIS 22370*. Certiorari Denied February 20, 2001, Reported at: *2001 U.S. LEXIS 1685*.

PRIOR HISTORY:

Appealed from: U.S. Court of International Trade. Judge Jane A. Restani.

DISPOSITION:

REVERSED.

COUNSEL:

William D. Outman, II, Baker & McKenzie, of Washington, DC, argued for plaintiff-appellee. With him on the brief were Kevin M. O'Brien, Teresa A. Gleason, and Michael E. Murphy.

Lara Levinson, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief were David W. Ogden, Acting Assistant Attorney General, David M. Cohen, Director, Jeanne E. Davidson, Deputy Director, and Todd M. Hughes, Attorney. Of counsel on the brief was Richard McManus, Office of the Chief Counsel, United States Customs Service, of Washington, DC.

Patrick D. Gill, Rode & Qualey, of New York, New York, for amicus curiae Capital-Mercury Shirt Corp. Melvin S. Schwechter, LeBoeuf, Lamb, Greene & MacRae, L.L.P., of Washington, DC, for amicus curiae Rapid Industrial Plastics Co. Inc. Steven H. Becker, Coudert Brothers, of New York, New York, for amicus curiae Alfred C. Toepfer International, Inc. Peter Jay Baskin, Sharretts, Paley, Carter & Blauvelt, P.C., of New York, New York, for amicus **[**2]** curiae Bunge Corporation. Steven P. Florsheim, Grunfeld, Desiderio Leibowitz & Silverman LLP, of New York, New York for amicus curiae Mondial International Corp. Munford Page Hall, II, Dorsey & Whitney, LLP, of Washington, DC, for amicus curiae New Holland North America, Inc. Barry E. Cohen, Crowell & Moring, LLP, of Washington, DC for amicus curiae Elliott Turbomachinery Company. Brian S. Goldstein, Graham & James, LLP, of New York, New York, for amici curiae AgrEvo USA Company and Nor-Am Chemical Company. Gilbert Lee Sandler, Sandler, Travis & Rosenberg, P.A., of Miami, Florida, for amicus

curiae Oshkosh B'Gosh, Inc. James S. O'Kelly, Barnes, Richardson & Colburn, of New York, New York, for amicus curiae Firmenich, Inc.; of counsel was Christopher E. Pey. Mark Stuart Zolno, Katten, Muchin & Zavis, of Chicago, Illinois, for amicus curiae Perseco Asia-Pacific, L.P.

Leslie Alan Glick, Porter, Wright, Morris & Arthur, of Washington, DC, for amici curiae CombiBloc, Inc., Carter-Wallace, Inc., Allied Mineral, Inc., Techneglas, Inc., and Diehl, Inc.

Jerry P. Wiskin, Simons & Wiskin, of New York, New York, for amicus curiae Cam USA, Inc.

JUDGES:

Before PLAGER, CLEVENGER, and RADER, Circuit Judges.

OPINION BY:

PLAGER

OPINION:

PLAGER, Circuit Judge.

The United States ("the Government") appeals a judgment of the United States Court of International Trade, which awarded interest on refunds of the Harbor Maintenance Tax ("HMT"). The Supreme Court had earlier held that the HMT, as applied to exports, violates the Export Clause of the United States Constitution, and cannot be lawfully collected.[1] This

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[1] *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998).

case was filed to test whether the Government is obligated by law to pay interest on these refunds.

The Court of International Trade held that appellee may recover interest on refunds of HMT payments resulting from the Supreme Court's decision.[2] The trial court adjudged that 28 U.S.C. § 2411, which provides for post-payment interest on tax refunds, applies.[3] We conclude that neither § 2411 nor any other statutory provision provides the necessary authorization for an award of interest to appellee on its HMT refunds. The judgment of the trial court is reversed.

BACKGROUND

The HMT, enacted by Congress as part of the Water Resources Development Act of 1986, 26 U.S.C. § 4461-62 (1994), is an ad valorem tax imposed on shipments of commercial cargo which pass through the country's ports. Several thousand exporters challenged the constitutionality of the HMT as applied to exporters. In a test case, a three-judge panel of the Court of International Trade held that the HMT violates the Export Clause of the United States Constitution. See *United States Shoe Corp. v. United States*, 19 C.I.T. 1284, 907 F. Supp. 408 (1995). This decision was affirmed by a five-judge panel of this court, see *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), which decision was affirmed by the Supreme Court, see *United States v. United States Shoe Corp.*, 523 U.S. 360, 118 S. Ct. 1290, 140 L. Ed. 2d 453 (1998).

In the course of the initial litigation before the Court of International Trade, that court issued an Order declaring that the

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[2] *IBM v. United States,* 1998 Ct. Intl. Trade LEXIS 73, No. 94-10-00625, 1998 WL 325156 (Ct. Int'l Trade June 17, 1998).

[3] All references to the United States Code are to the 1994 edition unless otherwise indicated.

plaintiff was entitled to a refund "together with interest and costs as provided by law." *United States Shoe Corp. v. United States*, 19 C.I.T. 1413, 924 F. Supp. 1191, 1191 (Ct. Int'l Trade 1995). Subsequently the court determined that the question of interest on the refund judgment "is not a matter without controversy and it cannot be resolved as a simple clerical matter." *U.S. Shoe*, 20 Ct. Int'l Trade 206, 207 (1996). The Court of International Trade called for briefing on the issue of whether the exporters may recover interest. However, before the court issued its decision on the question of plaintiff's entitlement to interest, the Government filed a notice of appeal from the court's earlier decision on the constitutional issue. Thus, the interest issue was not addressed during the appellate proceedings that followed.

While the appeal of the constitutional issue was proceeding, the Court of International Trade decided the question of whether the exporters were entitled to interest on their refunds. The court acknowledged that the United States is immune from paying interest absent express congressional consent, citing *Library of Congress v. Shaw*, 478 U.S. 310, 314, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986). See *U.S. Shoe*, 20 Ct. Int'l Trade at 207. The court found the necessary express authorization with regard to HMT refunds in 28 U.S.C. § 2411, which provides that "in any judgment of any court rendered (... against the United States ...) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment ...." *U.S. Shoe*, 20 Ct. Int'l Trade at 207-08.

After the Supreme Court affirmed the unconstitutionality of the HMT as applied to exports, the Court of International Trade designated this case as a companion test case to U.S. Shoe to give the Government the opportunity to appeal the award of interest. See *IBM*, 1998 WL 325156, at *1. The Court of International Trade deemed filed in this case the briefs concerning the issue of interest filed in the U.S. Shoe proceedings as well

as its 1996 U.S. Shoe opinion awarding interest. See *id.* This appeal followed.

DISCUSSION

The issue of whether Congress has expressly authorized interest on HMT refunds is one of statutory interpretation, a question of law that we review independently and without deference to the trial court. See *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (questions of law subject to full and independent review). The oft-repeated general principle is that the United States is immune to claims for interest unless Congress has waived immunity by expressly consenting to an award of interest. See *Shaw*, 478 U.S. at 314. Congressional consent must be unambiguous. See *id.* at 318.

The HMT statutory provisions are relatively brief, and are codified in two sections, numbered 4461 and 4462, as "Subchapter A--Harbor Maintenance Tax" in Chapter 36-Certain Other Excise Taxes, as part of Title 26-Internal Revenue Code. Section 4461 imposes the tax, and section 4462 provides definitions and special rules. Nothing in Subchapter A expressly addresses the question of whether in a refund of taxes paid thereunder, the payor is entitled to interest on the refund. The only provisions of Subchapter A that bear on the question are found in two paragraphs in subsection 4462(f), entitled "Extension of provisions of law applicable to customs duty."

Paragraph (1) of subsection (f) states: "Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter ...." Paragraph (3) states: "The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." (Subtitle F of Title 26 deals with the procedure and administration of the internal revenue system.)

It appears abundantly clear from these provisions that, even though the HMT is codified as an excise tax and is part of the Internal Revenue Code ("IRC"), Congress intended the administration and enforcement of the tax to be treated as if the tax was a customs duty, and not a tax under the IRC.

Because the statutory provisions which established the HMT do not explicitly authorize interest payments on refunds of the tax, if Congress authorized such payments the authorizing statute must be found elsewhere. And if such a statute is found, we must determine whether Congress by the provisions of subsection (f) quoted above has precluded its application to an HMT refund. We have been urged to look at several possible sources for the authorization; we shall examine each in turn.

1.

Subtitle F of Title 26, the Internal Revenue Code, in § 6611(a), states that "interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." This provision of the Code cannot apply because the HMT statute, § 4462(f)(3), specifically exempts the HMT from all provisions in subtitle F of Title 26: "the [HMT tax] shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Thus, any Congressional authorization of interest payments on HMT refunds must be found outside of subtitle F.

The Court of International Trade found the necessary express authorization for interest payments in another Title of the United States Code, namely Title 28, which is entitled "Judiciary and Judicial Procedure." 28 U.S.C. § 2411 provides, in relevant part, that "in any judgment of any court rendered (... against the United States ...) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under [26 U.S.C. § 6621] upon the amount of the overpayment ...."

In its analysis of § 2411, the Court of International Trade first determined that the HMT is an internal revenue tax within the meaning of § 2411. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208. The court then considered whether the two paragraphs of the HMT statute quoted above precluded application of § 2411 to HMT refunds. The court concluded that the HMT refund process would not constitute either "administration" or "enforcement" of the HMT, and that the HMT statute did not exempt HMT refunds from application of § 2411. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208-09.

For purposes of analysis, we accept the argument of appellee and the holding of the Court of International Trade that payment of the HMT by exporters is an "internal revenue tax" within the meaning of § 2411. Because Congress codified the HMT as part of Title 26 of the United States Code, entitled "Internal Revenue Code," we may reasonably conclude that Congress considered the HMT to be an internal revenue tax. Furthermore, while it may be true that the constitutionality of the HMT was challenged because the HMT taxed goods exported out of the United States, the HMT is clearly derived from internal sources--the U.S. exporter--rather than external sources--the foreign recipient; HMT revenues were collected in the United States from domestic companies based on their use of ports and harbors in this country. Thus both the structure and the content of the HMT point toward it being an internal revenue tax, and thus entitled on refund to the interest award provided under § 2411.

Furthermore, we accept appellee's contention that the language of § 2411 is broad enough, and has been so construed, as to cover the case before us. The question, then, is whether the express provisions of the HMT statute preclude application of § 2411 to refunds of the tax. As previously noted, the HMT statute in subsection (f) of § 4462 directs that "the [HMT] shall not be treated as a tax for purposes of subtitle F *or any other provision of law relating to the administration and enforcement of internal revenue taxes*." 26 U.S.C. § 4462(f)(3) (emphasis

added). If the refund process for the unconstitutionally-levied HMT is not related to the "administration and enforcement" of an internal revenue tax, then § 2411 of Title 28 would appear to be ample authorization for interest to be paid on the refund. If, however, the refund process for this internal revenue tax relates to its administration and enforcement, the plain language of the HMT statute would bar the use of § 2411 as a statutory basis for an award of interest on HMT refunds.

This is a question of statutory interpretation. We begin with the language of the statute itself. If that language is clear and unambiguous, then it controls, and we need not--indeed we may not--go further. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 103 L. Ed. 2d 290, 109 S. Ct. 1026 *(1989))); Muwwakkil v. Office of Personnel Management*, 18 F.3d 921, 924 (Fed. Cir. 1994) ("When statutory interpretation is at issue, the plain and unambiguous meaning of a statute prevails."). To determine whether the statutory language is plain and unambiguous, we look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341.

Because the HMT statute does not define "administration and enforcement," we assume that the terms have their ordinary meaning, for which we may consult a dictionary. See *Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation ... that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that meaning, we look to the dictionary.") (citations omitted). Black's Law Dictionary defines "administer" as "to manage or conduct." Black's Law Dic-

tionary 44 (6th ed. 1990). "Enforce" is defined as "to put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to." *Id.* at 528.

Applying these definitions to the HMT statute, we read "administration and enforcement of internal revenue taxes" broadly to encompass not only management of the tax system, including the assessment and collection of tax payments and issuance of refunds and interest on those refunds by the agency responsible, but also enforcement of the tax laws, including the obtaining and enforcement of judgments against both taxpayers and the United States. Nothing in the language of the statute limits "administration and enforcement" to the narrow interpretation applied by the Court of International Trade, i.e., "matters of routine administration and enforcement by an agency." *U.S. Shoe*, 20 Ct. Int'l Trade at 208.

Examination of the phrase "administration and enforcement" in the context of 26 U.S.C. § 4462(f)(3) supports this broader interpretation. Again, that paragraph of the statute exempts the HMT from "subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Subtitle F of the Internal Revenue Code is entitled "Procedure and Administration." In addition to chapters addressing agency responsibilities such as "Assessment" (chapter 63), "Collection" (chapter 64), and "Abatements, credits, and refunds" (chapter 65), subtitle F includes a chapter on "Judicial proceedings" (chapter 76). That chapter includes provisions regarding civil actions by the United States (subchapter A), proceedings by taxpayers and third parties (subchapter B), the Tax Court (subchapter C), and court review of Tax Court decisions (subchapter D).

A fair reading of the phrase "subtitle F or any other provision of law" as used by Congress in the HMT statute would thus include both the administrative and judicial processes as activities that relate to the "administration and enforcement" of

taxes. Furthermore, interest on a tax refund would seem to be expressly included in those activities, since subtitle F itself contains a provision for interest on tax refunds, 26 U.S.C. § 6611(a). Accordingly, we are forced to conclude that Congress intended the phrase "administration and enforcement" to encompass not only agency action, but also judicial enforcement of the tax laws, including a judicial award of interest on tax refunds.

This interpretation is consistent with the other paragraph of subsection (f) of the HMT statute, § 4462(f)(1), quoted above, which provides that "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] as if such tax were a customs duty." The Tariff Act of 1930, codified in the United States Code in Chapter 4 of Title 19, entitled "Customs Duties," provides for the administration and enforcement of customs duties in Subtitle III, entitled "Administrative Provisions." As discussed below, that subtitle includes a provision for interest on refunds of customs duties. See 19 U.S.C. § 1505.

Section 4462(f)(3) is complementary to § 4462(f)(1), i.e., the administration and enforcement provisions relating to tax laws cannot apply to the HMT, see § 4462(f)(3), because the administration and enforcement provisions of the customs laws do apply to the HMT, see § 4462(f)(1). Accordingly, because an interest provision such as 19 U.S.C. § 1505(c) is an administrative and enforcement provision of the customs laws, the section of Title 28, § 2411, which provides for interest on tax refunds, is a "provision of law relating to the administration and enforcement of internal revenue taxes" within the meaning of 26 U.S.C. § 4462(f)(3) and cannot apply to the HMT.

Although it is unnecessary to consider the legislative history because the statutory language is clear from the language itself and its context, we note that the legislative history does not contradict the plain meaning of the HMT statute. The Senate Finance Committee report, cited by the Court of International Trade, states that it is more appropriate for the Customs

Service, rather than the Internal Revenue Service, to collect and administer the HMT because the Customs Service has a strong presence at ports of entry and experience at appraising merchandise. See S. Rep. No. 99-228, *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714. In order to facilitate the administration of the HMT by Customs, the report explains, the statute provides that all administrative and enforcement provisions of the customs law and regulations apply to the HMT as if it were a customs duty. See *id.* at 6714-15.

Though nothing in the legislative history defines the phrase "administration and enforcement," and the report is silent on the issue of whether a provision for interest on refunds relates to administration and enforcement, the legislative history confirms that § 4462(f)(3) was enacted as a counterpart to § 4462(f)(1) so that the administrative and enforcement provisions of only the customs statutes, and not the tax laws, would apply to the HMT. See *id.* at 6715. As noted above, the administrative provisions of the customs laws include interest provisions. Because Congress did not specifically exclude interest provisions from "administrative and enforcement provisions" with respect to § 4462(f)(1), we must conclude that the interest provisions of the customs laws, and not the tax laws, apply to the HMT.

2.

Having concluded that the HMT is to be treated as a customs duty for administrative and enforcement purposes, we look to the customs statutes for an express authorization of interest. Two provisions, 28 U.S.C. § 2644 and 19 U.S.C. § 1505(c), were raised before the Court of International Trade and by amici on appeal. We agree with the Court of International Trade that these customs provisions do not provide for interest on HMT refunds on the facts of this case. See *U.S. Shoe*, 20 Ct. Int'l Trade at 208-09.

28 U.S.C. § 2644 permits a judicial award of interest upon a judgment in a civil action brought pursuant to 19 U.S.C. § 1515

to contest the denial of an administrative protest. Appellee, however, did not pursue a refund of HMT payments through a customs protest. Indeed, in the earlier test case, the Court of International Trade had jurisdiction over the constitutional challenge to the HMT under 28 U.S.C. § 1581(i), the residual jurisdiction provision, and not under 28 U.S.C. § 1581(a), the provision that gives the Court of International Trade jurisdiction over actions filed under 19 U.S.C. § 1515. See *U.S. Shoe*, 523 U.S. at 366. Because appellee did not file an administrative protest and did not contest the denial of such a protest, appellee is not entitled to interest under 28 U.S.C. § 2644.

The customs laws also provide for pre-judgment interest on certain excess duties paid to Customs. Specifically, "interest on excess moneys deposited shall accrue ... from the date the *importer of record* deposits estimated duties, fees and interest ... to the date of *liquidation or reliquidation* of the applicable *entry* or reconciliation." 19 U.S.C. § 1505(c) (emphasis added); see also 19 U.S.C. § 1520(d) (1988) (repealed 1993) (authorizing interest "if a determination is made to reliquidate an entry"). On its face, the statute contemplates an entirely different factual scenario from the one before us. However, amici suggest that by substituting the exporter for the "importer of record," the HMT quarterly report for the "entry," and Customs' acceptance of the HMT payment for "liquidation," we can apply § 1505(c) to provide interest on HMT refunds. We are without power to rewrite a Congressional enactment to make it fit a case for which it was clearly not intended, no matter how compelling the case, particularly in light of the Supreme Court's mandate that Congress must expressly consent to an award of interest. See *Shaw*, 478 U.S. at 314. Accordingly, § 1505(c) does not authorize interest on HMT refunds.

In sum, we are bound by the rule that the United States is liable for interest only if Congress has waived sovereign immunity by expressly consenting to an award of interest. Section 4462(f) provides that the HMT is to be treated as a customs duty, and not as a tax, for purposes of statutory provisions relat-

ing to administration and enforcement. Because § 2411, the provision on which appellee and the trial court relied, is a provision of law relating to the administration and enforcement of taxes, the HMT statute precludes the application of § 2411 to provide interest on refunds of the HMT. Furthermore, the statutory provisions of the customs laws dealing with interest on refunds do not entitle this appellee, on these facts, to interest on HMT refunds.

Congress has waived sovereign immunity in both the tax code and the customs laws to permit interest to be paid on certain refunds to allow for the time value of money when the Government has had the use for a period of time of money to which it is not lawfully entitled. Congress has considered this to be only fair and proper. In the case before us, appellee makes a case for equal treatment. After thorough consideration, however, we are unable to find in the existing statutory framework, nor has any been cited to us, the necessary Congressional purpose to provide for interest on these particular refunds under the HMT. If relief for these taxpayers is to be granted, Congress must grant it.

CONCLUSION

The judgment of the Court of International Trade must be, and is,

REVERSED.

COSTS

Each party shall bear its own costs.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. CONST. art. I, § 9, cl. 5

> No Tax or Duty shall be laid on articles exported from any State.

U.S. CONST. amend. 5

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

19 U.S.C. 1505(b)

> Collection or refund of duties, fees, and interest due upon liquidation or reliquidation. The Customs Service shall * * * refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation.

19 U.S.C. 1505(c)

> Interest. Interest on excess moneys deposited shall accrue * * * from the date the importer of record deposits estimated dues, fees, and interest * * * to the date of liquidation or reliquidation of the applicable entry or reconciliation.

26 U.S.C. 4462(f)(1)

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the

[HMT] (and in respect of persons liable therefor) as if such tax were a customs duty.

26 U.S.C. 4462(f)(3)

The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

26 U.S.C. 6611

Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

28 U.S.C. 1581

(a) The Court of International Trade Shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

* * *

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. 1961(a)

Interest shall be allowed on any money judgment in a civil case recovered in a district court.

28 U.S.C. 1961(c)(1)

This section [i.e., Section 1961] shall not apply in any judgment of any court with respect to any internal revenue tax case.

28 U.S.C. 1961(c)(2)

[I]nterest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit.

28 U.S.C. 2411

In any judgment of any court rendered * * * for any overpayment in respect of any internal-revenue tax, interest shall be allowed.

28 U.S.C. 2644

If, in a civil action in the Court of International Trade under [19 U.S.C. 1515], the plaintiff obtains monetary

relief by a judgment or under a stipulation agreement, interest shall be allowed * * *. Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund.

19 C.F.R. 24.24

(a) Fee. Commercial cargo loaded on or unloaded from a commercial vessel is subject to a port use fee of 0.125 percent (.00125) of its value * * *.

* * *

(e) Collections, supplemental payments, and refunds –

(4) Refunds and supplemental payments -- (i) General. To make supplemental payments or seek refunds of harbor maintenance fees paid relative to the unloading of imported cargo, the procedures applicable to supplemental payments or refunds of ordinary duties must be followed. To seek refunds of quarterly-paid harbor maintenance fees pertaining to export movements, the procedures set forth in paragraph (e)(4)(iv) of this section must be followed. To make supplemental payments on any quarterly-paid harbor maintenance fee or seek refunds of quarterly-paid harbor maintenance fees pertaining to other than export movements, the procedures set forth in paragraph (e)(4)(iii) must be followed.

* * *

(ii) Time limit for refund requests. A refund request must be received by Customs within one year of the date the fee for which the refund is sought was paid to Customs or, in the case of fees paid relative to imported merchandise admitted into a foreign trade zone and subsequently withdrawn from the zone under 19 U.S.C. 1309, within one year of the date of withdrawal from the zone.

(iii) For fees paid on other than export movements. If a supplemental payment is made for any quarterly-paid harbor maintenance fee or a refund is requested relative to quarterly fee payments previously made regarding the loading or unloading of domestic cargo, the unloading of cargo destined for admission into a foreign trade zone, or the boarding or disembarking of passengers, the refund request or supplemental payment must be accompanied by a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) covering the payment to which the refund request or supplemental payment relates. A request for a refund must specify the grounds for the refund.

(iv) For fees paid on export movements. Customs will process refund requests relative to fee payments previously made regarding the loading of cargo for export as follows:

(A) Refund request. For export fee payments made prior to July 1, 1990, the exporter (the name that appears on the SED or equivalent documentation authorized under 15 CFR 30.39(b)) or its agent must submit a letter of request for a refund specifying the grounds for the refund and identifying the specific payments made. The letter must be accompanied by the proof of payment set forth in paragraph (e)(4)(iv)(C) of this section. For export fee payments made on or after July 1, 1990, supporting documentation is not required with the refund request. For these payments, the request must specify the grounds for the refund, identify the quarters for which a refund is sought, and contain the following additional information: the exporter's name, address, and employer identification number (EIN); the name and EIN of any freight forwarder or other agent that made export fee payments on the exporter's behalf; and a name, telephone number, and facsimile number of a contact person.

(B) Refund procedure -- (1) Processing order; power of attorney. Generally, a properly filed refund request will be processed in the chronological order of its receipt. A refund request filed on behalf of an exporter by an agent other than a freight forwarder must be supported by a power of attorney or letter signed by the exporter authorizing the representation. A refund request filed by an agent other than a freight forwarder that lacks a power of attorney or authorization letter will not be processed unless one or the other is submitted. A refund request filed by a freight forwarder does not require a power of attorney or authorization letter to be processed; however, if Customs has not received a power of attorney or authorization letter for an exporter covered in a freight forwarder's refund request and that exporter has filed a separate refund request on its own behalf, that freight forwarder's entire refund request will be removed from the chronological processing order and processed after the processing of all exporter refund requests is completed.

(2) HMT Payment Report and Report/Certification. In processing a request for a refund, Customs will conduct a search of its records (Customs electronic database and paper document sources) and produce for issuance to the exporter (or its agent, as appropriate) a "Harbor Maintenance Tax Payment Report" (HMT Payment Report) that lists all payments reflected in those records for the entire period the fee was in effect. Customs will also produce for issuance to the exporter a "Harbor Maintenance Tax Refund Report and Certification" (Report/Certification) that lists all payments supported by paper documentation, either retained by Customs (relative to payments made on and after July 1, 1990) or submitted by the exporter with its refund request (relative to payments made at any time the fee was in effect). Where a refund request was filed on the exporter's behalf by an agent other than a freight forwarder, a power of attorney or authorization letter must be filed with Customs be-

fore Customs will issue these reports. The Report/Certification sets forth the total amount of the refund that Customs believes it owes the exporter for the payments listed in that report (minus any previous refunds). Pre-July 1, 1990, payments listed in the HMT Payment Report for which paper documentation has not been provided by the exporter will not be listed in the Report/Certification. The exporter has 120 days from the date the HMT Payment Report and the Report/Certification are issued (the 120-day period) to sign and return to Customs the Report/Certification in order to receive the refund set forth in that report and/or to submit to Customs a request for a Revised Report/Certification. Where the exporter chooses to receive the refund set forth in the Report/Certification, the exporter must sign and return the report to Customs. Customs will issue the refund upon receipt of the signed report.

(3) Revised Report/Certification. A request for a Revised Report/Certification must be accompanied by documentation to support any payments not listed in the Report/Certification or corrections to listed payments. See paragraph (e)(4)(iv)(C) of this section regarding acceptable documentation. If an exporter (or its agent, as appropriate) both signs and returns to Customs a Report/Certification and requests a Revised Report/Certification, Customs will not, when reviewing the request for a Revised Report/Certification, approve for refund any corrections to the payments that were listed in the signed Report/Certification; Customs will, however, in that circumstance, consider approving any additional payments that were not listed in the signed Report/Certification. If an exporter does not sign and return to Customs a Report/Certification, but requests a Revised Report/Certification, Customs will consider approving for refund corrections to the payments listed in the Report/Certification and additional payments. Where the exporter requests a Revised Report/Certification, Customs

will review the documentation submitted with the request, make a determination, and, within 60 days of the request's receipt, issue a Revised Report/Certification that lists all payments approved for refund and the total amount of the refund owed. In order to receive the refund set forth in a Revised Report/Certification, the exporter must sign and return it to Customs. Customs will issue the refund upon its receipt of the signed report. An exporter, within the 120-day period, may submit additional requests for a Revised Report/Certification, with appropriate documentation, to cover any payments not approved for refund in a Revised Report/Certification previously issued by Customs.

(4) Protest. For purposes of filing a protest under 19 U.S.C. 1514 (and 19 CFR part 174), unless issuance of a Revised Report/Certification is pending, any payments not approved for refund in a Report/Certification or a Revised Report/Certification issued by Customs within the 120-day period will be considered denied as of the date the period expires; a protest covering such payments must be filed within 90 days of that date. For any payments not approved for refund in a Revised Report/Certification issued after expiration of the 120-day period, a protest may be filed within 90 days of that report's issuance.

(5) Significance of signed Report/Certification and Revised Report/Certification. A Report/Certification or Revised Report/Certification must be signed by an officer of the company duly authorized to bind the company or by an agent (such as a broker or freight forwarder) representing the exporter in seeking a refund under this section. A Report/Certification or Revised Report/Certification signed by the exporter or its agent and received by Customs constitutes the exporter's agreement that the amount of the refund set forth in the report is accurate and Customs payment of that refund amount is in full accord and satisfaction of all payments approved for refund in the report. The signed Report/Certification or Revised Report/Certification also rep-

represents the exporter's release, waiver, and abandonment of all claims, excluding claims for interest, against the Government, its officers, agents, and assigns for costs, attorney fees, expenses, compensatory damages, and exemplary damages arising out of the payments approved for refund in the report. When an agent, including a freight forwarder, signs a Report/Certification or Revised Report/ Certification on behalf of an exporter(s), the agent certifies that it is acting on the exporter's behalf and will use due diligence to forward the refund to the exporter, and, in the event the agent does not forward the refund to the exporter, will notify Customs and return the refund to Customs within one year of its receipt of the refund. Upon receipt of the signed Report/Certification or Revised Report/Certification, Customs releases, waives, and abandons all claims other than fraud against the exporter, its officers, agents, or employees arising out of all payments approved for refund in the report.

(C) Documentation. For payments made prior to July 1, 1990, supporting documentation is required to obtain a refund and must be submitted in accordance with paragraphs (e)(4)(iv)(A) and/or (B)(3) of this section. For payments made on and after July 1, 1990, supporting documentation is not required to obtain a refund, unless the exporter seeks to prove corrections of payments listed in the Report/Certification (if the exporter did not sign and return it to Customs) and/or additional payments not listed in a Report/Certification, in accordance with paragraph (e)(4)(iv)(B)(3) of this section. The supporting documentation that Customs will accept as establishing entitlement to a refund, whether submitted with a refund request or a request for a Revised Report/Certification, is whichever of the following documents Customs accepted with the payment at the time it was made: a copy of the Export Vessel Movement Summary Sheet; where an Automated Summary Monthly Shipper's Export Declaration was filed, a copy of a

letter containing the exporter's identification, its employer identification number (EIN), the Census Bureau reporting symbol, and, the quarter for which the payment was made; or a copy of a Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter covering the refund requested. Customs also will consider other documentation offered as proof of payment of the fee, such as cancelled checks and/or affidavits from exporters attesting to the fact that all quarterly harbor maintenance tax payments made by the exporter were made exclusively for exports, and will accept that other documentation as establishing entitlement for a refund only if it clearly proves the payments were made for export harbor maintenance fees in the amounts sought to be refunded and were made by the party requesting the refund or the party on whose behalf the refund was requested.

Draft Notice of Proposed Rulemaking

DEPARTMENT OF THE TREASURY
UNITED STATES CUSTOMS SERVICE
19 CFR PARTS 24 AND 113
RIN 1515-AB76

INTEREST ON UNDERPAYMENTS AND OVERPAYMENTS OF CUSTOMS DUTIES, TAXES, FEES, INTEREST AND OTHER CHARGES

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of Proposed Rulemaking

SUMMARY: This document proposes to amend the Customs Regulations to reflect the provisions of section 505 of the Tariff act of 1930 (19 U.S.C. 1505), as amended by section 642(a) of the North American Free Trade Agreement Implementation Act, regarding the assessment of interest due to underpayments or overpayments to Customs of duties and fees pertaining to imported merchandise, including interest thereon. The document also proposes to amend the Customs Regulations regarding the payment of interest due to underpayments or overpayments of fees and other charges, including interest thereon, that are not expressly covered by the terms of 19 U.S.C. 1505 but to which the same principles apply. As reflected in the proposed amendments, interest accrues initially from the date the duties, fees or other charges are deposited, or are required to be deposited, with Customs. In addition, the document proposes to amend various regulatory provisions regarding Customs bond obligations to reflect liability for payment of fees and interest.

* * *

Customs believes that there is a proper legal basis for applying the section 505 interest principles to all statutorily required fees such as those listed above even where the final amount of the required fee payment is not finally determined in connection with a liquidation or reliquidation. In this regard, Customs notes that 19 U.S.C. 58c(g)(2) provides that "[e]xcept to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations . . . shall apply with respect to any fee prescribed under subsection (a) of this section, and with respect to persons liable therefor, as if such fee is a customs duty." Further, 26 U.S.C. 4462(f)(1) similarly provides that "[e]xcept to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty." Therefore, consistent with the statutory principle of treating the fees and taxes imposed under 19 U.S.C. 58c and 26 U.S.C. 4461 as if they were customs duties, Customs is required to apply the rules and principles of section 505 to those fees and taxes. Customs believes that section 505 is one of the customs laws which by Congressional mandate applies to the fees and taxes Customs collects pursuant to 19 U.S.C. 58c and 26 U.S.C. 4461.

Accordingly, Customs believes that it is appropriate, under applicable statutory authority, to amend the regulations to reflect the applicability of the section 505 interest provisions to all fees (including the railroad car and passenger arrival fees under 19 U.S.C. 58(c) and the port use (harbor maintenance) fee applicable to commercial passengers and to imported merchandise admitted into a foreign trade zone and to the export or coastwise movement of merchandize under 26 U.S.C. 4461). Thus, the regulations would reflect that interest is assessable on underpayments of all fees from the date the fee was required to be deposited with Customs and that interest accrues on over-

payments of all fees from the date the fee was deposited with Customs.

* * *

It is proposed to amend 24.36 by revising the first sentence of paragraph (a), by adding a new sentence at the end of paragraph (a), by revising the first sentence of paragraph (b), and by revising paragraph (c). These proposed changes would: add references to the refund of excessive "fees" and "interest" as provided for in section 505(b); reflect the 30-day deadline for timely refunds provided for in section 505(b) and the 30-day interest period provisions for delinquent refunds under section 505(d); and extend the refund provisions to cover duties, taxes, fees, interest and other charges not incurred in connection with the entry liquidation process, in order to reflect the Customs modernization and treatment-as-duties principles discussed above and also cover cases in which an administrative refund is made by Customs prior to liquidation of an entry. The majority of these substantive changes are contained in the proposed new sentence at the end of paragraph (a) and, except where variances are necessary to reflect a refund context, those proposed changes generally follow the terminology and structure used in the proposed revision of 24.3a discussed above.

* * *

New paragraph (a)(1)(ii), which would cover the accrual of interest on refunds not resulting from a liquidation process, provides for accrual "from the date the fees . . . or other charges . . . were paid to Customs to the date on which the amount to be refunded is determined," because this time period is most analogous to the time period prescribed in section 505(c).

New paragraph (a)(2)(ii) provides that other refunds (that is, refunds not determined to be due on a liquidation or reliquidation) shall be paid within 30 calendar days of "the date on which the amount to be refunded is determined," because that point in time is most analogous to the date of liquidation or reliquidation prescribed in section 505(b).

* * *

(1) The refund shall include interest on the excess moneys deposited with Customs,

and such interest shall accrue:

(i) From the date the duties , taxes, fees (see 24.23 and 24.24(e)(3)(ii)), and interest were deposited with Customs to the date of liquidation or reliquidation of the applicable entry or reconciliation; or

(ii) In all other cases, from the date the duties, taxes, fees (see, for example, 24.22(d) and (g) and 24.24(e)(1), (2), (3)(iii) and (4)), interest or other charges (for example, charges for reimbursable services under 24.16 and 24.17 and miscellaneous charges other than liquidated damages, fines, and penalties) were paid to Customs to the date on which the amount to be refunded is determined;

(2) The refund, together with interest thereon as provided in paragraph (a)(1), shall be paid:

(i) In the case of a refund of duties, taxes, fees, or interest determined to be due on a liquidation or reliquidation, within 30 calendar days of the date of liquidation or reliquidation; or

(ii) In all other cases, within 30 calendar days of the date on which the amount to be refunded is determined.